SOME ASPECTS OF NIGERIAN PRIVATE INTERNATIONAL LAW OF FAMILY RELATIONS: A COMPARATIVE STUDY

by

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ABSTRACT

Nigeria is a federation of twelve States each of which is competent, according to the Constitutional allocation of legislative powers, to make laws practically on all matters of family relations. The municipal law of each State comprises one system of territorial (Western-type) law and another system of non-territorial (Customary or Moslem) law. There is not only multiplicity in the bodies of the latter system in each of most of the States, but the system itself contains institutions more unusual than those the legal systems of Western civilization are accustomed to dealing with.

Yet the world's modern technological developments, and recent upward trends in the economic development in Nigeria, are bringing peoples and diverse legal institutions far closer together. The mobility of population, and hence the possibility of complex legal relations, is greatly facilitated at the inter-state level by the consitutional guarantee of the right of movement within the federation to all persons who are legally within one part of it. These factors of federalism, dualism of system of law, diversity of legal institution and the mobility of our time, have jointly made Nigeria a special problem area for the study of conflicts of laws.

In this pioneering work, an attempt is made not merely to state the existing rules of Nigerian private international law of family relations in the context of the above phenomena. An analytical approach is linked with a discussion on the prospective development of the law in the fields covered by the work. In these circumstances, the work cannot be anything but comparative. Chapter One deals with the sources and development of the Nigerian private international law of family relations. Chapter two considers Domicile as a jurisdictional and choice

of law concept. In Chapter Three, the problem of the choice of the applicable laws in the formation of both monogamous and polygamous marriages is considered. Chapter Four is devoted to an examination of the Choice of the system of Court, Basis of Jurisdiction, Choice of the applicable Law and Recognition of sister-state and foreign decrees, as regards the dissolution of both types of marriage. Chapter Five is a discussion on the concept of Legitimacy under the domestic laws in Nigeria as a prelude to an appreciation of Legitimacy in its conflicts of laws, a subject which is discussed in Chapter Six. Chapter Seven is on Adoption. Chapters Eight and Nine concern Administration of Estates and Succession respectively; while the Postscript considers the effect of a recent Nigerian Decree on few of the matters discussed in Chapters Two and Four.

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CONTENTS

Page

LIST OF ABBREVIATIONS AND MODES OF CITATION

(Excluding English Case References)

A L R Comm.	African Law Reports, Commercial Law Series.
Adelaide L.R.	Adelaide Law Review
All N.L.R.	All Nigeria Law Reports
Am. J. Comp. Law	American Journal of Comparative Law
Am. J. Int. Law	American Journal of International Law
Argus L.R.	Argus Law Reports (Australia)
Aust. L.J.	Australian Law Journal
B.U.L.R.	Boston University Law Review
B.Y.B.I.L.	British Year Book of International Law
C.J.F.	Chief Justice of the Federation (Nigeria)
C.L.R.	Commonwealth Law Reports (Australia)
C.W.S.N.A.L.N.	Central West State (Now Kwara State) Native Authority Legal Notice (Nigeria)
Cal.	California Reports (U.S.A.)
Cmd. or Cmnd.	Command Papers (England)
Can. Bar Rev.	Canadian Bar Review
Colum. L. Rev.	Columbia Law Review
Cornell L.Q.	Cornell Law Quarterly
D.L.R.	Dominion Law Reports (Canada)
D.L.R. (2D)	Dominion Law Reports, Subsequent Series (Canada)
Div. Ct. (1921-25) Rep.	Selected Judgments of the Divisional Courts 1921-1925 (Ghana)
E.A.	Eastern Africa Law Reports
E.A.C.A.	Law Reports of the Court of Appeal for Eastern Africa
E.A.L.J.	East Africa Law Journal
EGBGB.	Einfuhrungsgesetz sum Burgerlichen Gesetzbuch (Germany)
E.N.L.R., E.R.L.R., or E.R.N.L.R.	Eastern Nigeria Law Reports (In this thesis, E.N.L.R. is employed as a standard mode of citation).

F.	Federal Reporter (U.S.A.)
F. (2d.)	Federal Reporter, Second Series (U.S.A.)
F.L.R.	Federal Law Reports (Australia)
F.S.C.	Federal Supreme Court of Nigeria, or Reports of Selected Judgments of the Federal Supreme Court of Nigeria
Fed.	Federal or Federation
G.L.R.	Ghana Law Reports
Harv. L.R.	Harvard Law Review
I.C.L.Q.	International and Comparative Law Quarterly
I.L.Q.	International Law Quarterly
Ia.	Iowa Reports (U.S.A.)
Ind. L.J.	Indiana Law Journal
Ir. Jur. Rep.	Irish Jurists Reports (Republic of Ireland)
J.A.L.	Journal of African Law
Journ. Comp. Leg.	Journal of Comparative Legislation and International Law
K.S.N.A.L.N.	Kano State Native Authority Legal Notice (Nigeria)
L.L.R.	Law Reports of the High Courts of Lagos (Nigeria)
M.L.R.	Modern Law Review
Mass.	Massachussetts Reports (U.S.A.)
Md.	Maryland Reports (U.S.A)
Mich. L. Rev.	Michigan Law Review
Minn. L. Rev.	Minnesota Law Review
Misc.	Miscellaneous Reports, New York (U.S.A.)
N.A.L.N.	Native Authority Legal Notice (Northern Nigeria)
N.C.	North Carolina Reports (U.S.A.)
N.E.	North Eastern Reporter (U.S.A.)
N.Ir.	Northern Ireland Reports
N.L.R.	Nigeria Law Reports
Nig. L.J.	Nigerian Law Journal

N.M.L.R.	Nigeria Monthly Law Reports
N.R.L.N.	Northern Region Legal Notice (Nigeria)
N.R.N.L.R., or N.N.L.R.	Northern Nigeria Law Reports (In this thesis, N.N.L.R. is employed as a standard mode of citation).
N.W.	North Western Reporter (National Reporter System in the U.S.A.)
N.Y.	New York Court of Appeals Reports (U.S.A.)
N.Y.S.	New York Supplement (Law Reports)(U.S.A.)
N.Z.L.R.	New Zealand Law Reports
Pac.	Pacific Reporter (U.S.A.)
Pac. (2d)	Pacific Reporter, Second Series (U.S.A.)
Queensland S.R.	State Reports of Queensland (Australia)
R.N.L.J.	Rhodesia and Nyasaland Law Journal
Recueil des Cours	Recueil des Cours de l'Académié de droit international de la Haye.
Ren G.C.Rep.	Renner's Gold Coast Reports (Ghana)
Rutgers L. Rev.	Rutgers Law Review
S.A.	South Africa Law Reports
S.A.L.J.	South Africa Law Journal
S.A.S.R.	South Australia State Reports
S.J.	Solicitors' Journal (England)
S.L.J.R.	Sudan Law Journal and Reports
S.L.R.	Scottish Law Reporter
S.L.T.	Scots Law Times
S.R.	Southern Rhodesia Law Reports
S.R.N.	Southern Rhodesia Law Reports, Native Appeal Cases
S.R. (N.S.W.)	State Reports, New South Wales (Australia
Saskatchewan Bar Rev.	Saskatchewan Bar Review (Canada)
Sess. Cas.	Dunlop's Court of Session Cases, 2nd Series (Scotland)

Tr. Gr. Soc.	Transactions of the Grotius Society
U.S.	United States Reports
Univ. of Pitt. L. Rev.	University of Pittsburg Law Review
V.R., or V.L.R.	Victoria Law Reports (Australia)
Vand. L.R.	Vanderbilt Law Review
W.A.R.	Western Australia Reports
W.A.C.A.	Selected Judgments of the West African Court of Appeal
W.N. (N.S.W.)	Weekly Notes, New South Wales (Australia)
W.R.L.N.	Western Region of Nigeria Legal Notice
W.R.N.L.R. or W.N.L.R.	Western Nigeria Law Reports (In this thesis W.N.L.R. is used as a standard mode of citation)
Yale L.J.	Yale Law Journal

CHAPTER ONE

SOURCES AND DEVELOPMENT OF PRIVATE INTERNATIONAL LAW OF FAMILY RELATIONS IN NIGERIA

A. THEORIES ON SOURCES OF PRIVATE INTERNATIONAL LAW.

1. INTERNATIONAL LAW THEORY.

The sources of private international law or conflict of laws have been a matter of argument. Two major and contrasted juristic views have been expressed from time to time as to the sources of the subject. One view, mainly expressed by some continental and a few Anglo-American jurists, is that private international law "is not merely a part of the domestic law of a state"[1] but a subject that must be considered from a wider angle as "the private law of the universal society of mankind"[2] akin to, or part of, the law of nations; common to all countries and is, or should be, everywhere the same. According to this view the rules of this body of law are an international obligation binding upon all the diverse municipal systems of law. Decisions on the same matters involving foreign elements should not be different whatever the national court before which they are brought. The only factor that may give rise to divergent decisions in respect of the same matters is attributable to the doctrine of public policy or, as Jitta would like to call it, a right of non-collaboration[3]

1. Bar: Private International Law, Gillespie's translation (1892)p.2.
2. Jitta: La Method du Droit International Prive (1890), p.242.
3. Jitta: The Renovation of International Law, p.93. Jitta regards public policy as a vague term. The doctrine itself, he claims, labels a foreign law rejected through its application as of no legal effect. This is unacceptable to him on the basis that a municipal system cannot deny the validity of a foreign law.

inhering in the court of the forum which operates to reject the application of a foreign law which is repugnant to the forum's social or legal institutions. With Savigny [4] as the original protagonist, this school of thought found some disciples[5] both in the civil law and the common law countries and has, at a time when it was supposed to have been eclipsed by the theory of territorial law, been somewhat revived by an American jurist.[6]

2. TERRITORIAL LAW THEORY.

Diametrically opposed to the above view is that which regards rules of private international law of a particular country as being directly governed by its rules of substantive law. In this sesne, the rules of substantive law are constituents of private international law. This body of law therefore constitutes an embodiment of interacting rules, the sources of which must have to be looked for in almost all different branches of the municipal system but which rules are attuned to each and every one of these branches nevertheless. Professor Graveson expresses the view in clearer detail when he observes that:

> The principles of English conflict of laws applied in the English courts form part of English law in its widest sense, while individual principles of the conflict of laws form an integral part of the branch of law to which they relate. Thus, the rule that the validity of a contract as to form depends on the law of the place where the contract is made is equally a rule of conflict of laws and the law of contracts. Particularly for the purpose of this subject, law cannot be divided into a number of well-defined and water-tight compartments. For the conflict of laws is a cross-section of almost the whole law." [7]

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4. System des heutigen roemischen Recths, Vol.8 (1849), Para.348, pp.26 et seq. See also, Savigny, A Treatise on the Conflict of Laws (G. Guthrie's Translation) 1869, p.27.

5. Bar and Zitelmann of Germany; Jitta of Holland (for a discussic of the views of the continental advocates of international rules of conflicts of law, see III, Beale, Conflict of Laws, pp.1948-62); and Wharton: I, Conflict of Laws, p.6 in the U.S.A.

6. Jessup: Transnational Law (1956) esp. at p.15.

7. Graveson: The Conflict of Laws, (6th ed.) p.5.

Similarly Beale, the great exponent of the theory of territorial law in the United States of America stated that:

> "It follows from the principle [of territorial law] that conflict of laws is part of the laws of each state, that it is subject to the same development in each state as any other branch of the law." [8]

The conclusion deducible from this school of thought can be summarised simply in two propositions. 1. Private International Law being an all pervading subject draws for its authoritative sources on the statutes and judicial decisions making up almost all the different branches of a country's legal system. 2. It therefore varies according to the diversity in the legal system of the world.

This is not an appropriate forum to engage in a theoretical and extended discussion on the validity of either of the two theories. Suffice it to say that the utopia envisaged by the internationalists has not been attained. The diversity of national, state or provincial rules of private international law belies their argument in favour of a body of law having international validity. The opinion prevalent and widely accepted by the courts in the common law and most continental countries is that Private International Law is part of, and derives from, the same national, state or provincial sources as any other legal rule. [9]

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8. Beale: Conflict of Laws, Vol.3 (1835), p.52.

9. Almost all English writers regard the conflict of laws as a branch of the English municipal law. That part of Dicey's thesis in his earliest edition designed to show this has now been dropped in the most recent editions as a result of its being "universally accepted". See, e.g. Dicey's Conflict of Laws (7th & 8th Eds.), p.8.

   U.S.A.: The American Law Institute Restatement Second, of the Conflict of Laws (Proposed Official Draft, Part I), 196 s.5 describes the subject as part of the law of each state and that it is subject to the same development in each state as any other branch of the law.

F/note continued .....

This view, however, recognises the fact that the development of this subject may not successfully be made by maintaining a spirit of complete isolationism about the municipal law. It therefore does not object to, but actively encourages, the adoption of foreign principles where the municipal rules are non-existent or have been found defective in the light of present knowledge or modern developments. The adoption however, must be a conscious effort by the courts or the legislature of the adopting country. The impact on national institutions must be fully considered. Otherwise more difficulties than those the foreign rules are designed to solve may be created by the fostering of unsuitable principles on the courts of the receiving country. For example, owing to the late development of the English private international law, this approach has, at one time or the other, been followed, though now less consistently as in the latter part of the 18th century when a reasonably ascertainable body of principles in this field had not been evolved. Thus in Potinger v. Wightman [10] Sir Romily observed:

> "Of authority on this subject, in the English law, none exists ...., but it has been much discussed by foreign jurists, to whose opinions in the absence of domestic authorities) our courts are accustomed to resort, on questions which (like the present), must be decided rather by general principles of law."

F/note 9 cont. from previous page.

Canada: Johnson: Conflict of Laws (2nd ed.) p.1 "these rules[of Conflict of Laws] form part of the general corps of its law, expressed in formal texts or latent in influential jurisprudence".

German Democratic Republic: Szaszy: Private International Law in European Peoples Democracies, p.12.

Continental and other countries: e.g. where conflicts rules have been codified, See I, Rabel: Conflict of Laws: A Comparative Study, pp.29-32.

10. (1817), 3 Mer. 67.

He then went on to quote extensively from the works of foreign jurists [11] in search of the principle which he proposed to adopt for deciding the case in hand. With this argument Sir William Grant, M.R. agreed stating that there being so little to be found in English law on the subject of domicile, English judges "are obliged to resort to the writings of foreign jurists for the decision of most questions that arise concerning it".[12] This work of "social engineering" started by intellectually open-minded English judges has now virtually been taken over on the legislative plane. Most innovations introduced by Acts of Parliament in this field received inspiration from the civil law.[13] It is, therefore, not surprising that the practice of English judges in the development of the norms of English conflict of laws was reflected even in the positivist approach adopted by Dicey in the treatment of the subject when he stated:

> "The sources from which to ascertain the law of England..... with regard to rules of Private International Law are, first, Acts of Parliament; secondly, authoritative decisions or precedents; thirdly, where recourse can be had neither to statutory enactments nor to reported decisions, then such general principles as may be elicited from the judgment of foreign courts, the opinions of distinguished jurists, and rules prevalent in other countries." [14]

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11. John Voet, Rodenburg, Bynker Shoek, Grivello, Pothier and Huber.

12. Potinger v. Wightman (1817) 3 Mer. 67 at 79.

13. See Graveson: "Philosophical Aspects of the Conflict of Laws" in 78, L.Q.R. 337 at p.353 where a list is made of Acts of Parliament introducing new concepts into English Private International Law.

14. Dicey: Conflict of Laws (2nd ed.) p.23.

The modern conception of the territorial theory, with its bias towards a comparative method in the development of rules of private international law, having been implanted [15] into the Nigerian legal system for so long, it is unthinkable that the courts will deviate in this respect from their common law heritage and substitute for a solid foundation erected on a universal principle, one that was based on a shaky and moribund doctrinal theory. It is this universal practice that we propose to adopt in tracing the sources of Nigerian private international law. Our initial investigation is solely concerned with all the relevant categories of the Nigerian legal system. Only if the national sources are inadequate or found to be defective can we be justified in looking to other quarters.

B. NIGERIAN LAW SOURCES.

A consideration of the Nigerian sources is prefaced with an examination of the pre-colonial period in Nigeria so as to discover whether or not there existed any system of law capable of throwing up rules of private international law.

There is no doubt that before the advent of the British Colonial Administration, some legal rules of customary law for the regulation of the affairs of the communities now constituting Nigeria had existed.[16] The rules of this system of law had not been, and are still not, the same throughout the country. Customary law varied from place to place through adaptations to the needs of the various communities or "kingdoms" they served.

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15. See below,

16. See Allott: "The Future of African Law" in African Law: Adaptation and Development (ed. Kuper and Kuper), p.216 et seq; Nwabueze: Machinery of Justice in Nigeria, p.2.

The general characteristic of this system of law was that it was wholly unwritten and therefore uncertain. An exception was the northern part of the country where there had been a system of courts, the Alkali courts, applying local laws mostly of the Maliki school[17] of jurisprudence as expounded in the manuals of the school. Also in this area, there had been a judicial system which, like the present period, was wholly detached from the executive.[18] In some areas in the north, however, there had been such a great fusion of the Maliki law with tribal customary law that the two systems became almost impossible to be sorted into different compartments.[19] But the development of rules of private international law implies the existence of peaceful and commercial intercourse between different law districts or countries, aided in this respect by a network of means of easy communication. All these elements were lacking during the pre-colonial days - a period of inter-tribal wars, actively encouraged by the slave trade.

Even in its developed form, the system of customary law has been found deficient to cope with inter-communal or intra-national relations owing to its insistence on non-recognition and non-enforcement of any other law other than that prevailing in its area of operation. Accordingly, it was through recent legislative

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17. See Sharia Court of Appeal Law, Cap.122, Laws of Northern Nigeria (1963 ed.) s.2.

18. Anderson: Islamic Law in Africa, pp. vi-vii.

19. The present definition of customary law as inclusive of Moslem law in the Northern Nigeria High Court Law, Cap.49, (1963 ed.), s.2 recognises the fusion of Moslem law with customary law in places.

enactments[20] that choice of law rules - generally known as internal conflict of laws rules - for the governance of inter-communal relations were established. We therefore dismiss customary law, at the pre-colonial era and also in its modified form, as too imprecise and not sufficiently suphisticated for the solution of problems created by the easy means of inter-communication between distant countries, thereby giving rise to international and interstate transactions between diverse persons.

L. COMMON LAW OF ENGLAND.

Private international law, in the common law world, is a branch of law which has been built up mostly by judges in pursuance of the concept of justice and convenience. According to the American Law Institute,

> "In the United States, and in other Anglo-American countries, Conflict of Laws rules generally form part of the common law. Occasionally these rules are found in Constitutions, statutes and treaties. To the extent that they are embodied in common law rules, conflict of laws rules are as subject to change by the courts as are other common law rules." [21]

And in the words of Professor Graveson,

> "very few English statutes deal exclusively, or even substantially with questions of conflict of laws, ... a survey ... would underline more than anything the judge-made

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20. Eastern Nigeria, Customary Courts (No.2) Edict, No.29 of 1966, s.15, replacing Customary Courts Law, Cap.32, (1963 ed.) Laws of Eastern Nigeria, s.23.

Northern Nigeria, Native Courts Law, Cap.78, (1963 ed.) Laws of Northern Nigeria, ss.23 & 24, now replaced by the Area Courts Edict of the six Northern Nigerian States ss. 20 and 21.

Western & Mid-Western Nigeria, Customary Courts Law, Cap.31 (1959 ed.) Laws of Western Nigeria, ss. 19 & 20, now made applicable to Lagos State, by the Lagos State (Applicable Laws) Edict, No.2 of 1968.

21. Restatement Second, of the Conflict of Laws (Proposed Official Draft, Part 1), 1967: s. 5, Comment c.

character of the English conflict of laws." [22]

This tendency to "judicial legislation" in the field of private international law is not confined to the common law countries but extends also to most civilian countries even where rules of this body of law are mostly codified.[23] This is due, for example, in France to the "fragmentary and inadequate nature of the texts [of the Code Civil which] calls necessarily for a large and constructive body of case law. In fact the essential source of French private international law is to be found in the case law of the Cour de Cassation and of the tribunals subjected to its control".[24]

The common law rules of private international law in Nigeria, however, have a statutory foundation since their use rest on the reception statutues [25] prescribing that the "common law, the doctrines of equity and the statutes of general application" that were in force in England at a certain date shall be part of the laws of Nigeria. The pertinent question that must be asked is, which part of the phraseology "common law" and "the doctrines of equity" imports rules of private international law into Nigeria since it has been shown that private international law permeates nearly all the branches of the English legal system. Common law is a term which occurs in many legal contexts and bears diverse meanings depending upon the nature of the purpose for which it is employed. The sense in which it is here used is, in contradistinction to statute law, to denote the whole

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22. Graveson: "Philosophical Aspects of the English Conflict of Laws", 78 L.Q.R., 337 at p.349.
23. Rabel: The Conflict of Laws: A Comparative Study, Vol.1 (1958), 42.
24. Battifol: Traite Elementaire de Droit International Prive (3rd ed.) p.20.
25. See below

unwritten or judge-made law, not deriving its authority from any express legislative enactment.[26] By this definition, the received "doctrine of equity" refer only to those equitable rules, particularly in the law of trusts, which were designed to mitigate the harshness and excessive rigidity of common law courts' decisions on the same subject. With these, we are here not concerned.

As the first area of Nigeria to come under British colonial rule, in 1862, the Colony of Lagos passed an Ordinance[27] providing that all the "laws and statutes which were in force in England" on the 1st January, 1863, so far as they were not inconsistent with any Ordinance in force in the Colony, should be deemed to be in force in the territory. The application of such English laws and statutes was to be made as far as local circumstances would permit. Brandford Griffith, J. in Cole v. Cole [28] was able to say that the "common law" of England was included in the term "laws and statutes" of England.

In 1874, the Colony of Lagos was amalgamated with the British Settlement of Gold Coast (now Ghana) under the title of the Gold Coast Colony. While from this date onward, Ordinances were passed for the whole of the newly constituted Gold Coast Colony, numerous enactments previously existing in each of the two constituent parts of the new colony remained applicable to them. But as a result of the passing of the Supreme Court Ordinance in 1876, [29] which established one Supreme Court for the Gold Coast Colony, the relevant provision of the Ordinance of 1863 [30] were

26. Jowitt: The Dictionary of English Law Vol.I, p.426.
27. No.3 of 1863.
28. (1898) 1 N.L.R. 15, at p.18.
29. No. 4 of 1876.
30. This Ordinance was repealed by Ordinance No. 8 of 1889.

superseded by section 14 of the Supreme Court Ordinance. The section provided that

> "the common law, the doctrines of equity and the statutes of general application which were in force in England at the date when the colony obtained a local legislature, that is to say on the 24th day of July, 1874"

should be applicable within the jurisdiction of the court i.e. the two territories of Lagos and Gold Coast. By section 17, the Imperial laws were to apply subject to local circumstances and any local Ordinances.

In 1886, the Gold Coast Colony was once again sub-divided into the Gold Coast Colony and the Colony of Lagos, thus restoring the status quo of the two colonies before the amalgamation of 1874. Each colony resumed legislating for herself. And by an Ordinance of 1886,[31] the laws of the former Gold Coast Colony and the former Settlement of Lagos were provided to be applicable to the new Colony of Lagos.

With the establishment of the Protectorates of Northern and Southern Nigeria in 1900, all the Imperial laws which had hitherto obtained in the Lagos Colony were extended by Proclamation [32] to these areas. Finally, by the Supreme Court Ordinance 1914,[33] the reception date of English law was altered to 1st January, 1900. Section 14 of the Ordinance provided that:

> "Subject to the terms of this and any other Ordinance, the common law, the doctrines of equity and the statutes of general application which were in force in England on the 1st January, 1900 shall be in force within the jurisdiction of the court."

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31. No. 1 of 1886.

32. Supreme Court Proclamation, No. 6 of 1900 and, with the merger of the Colony of Lagos with the Protectorate of Southern Nigeria by the Supreme Court Ordinance No. 17 of 1906.

33. No. 6 of 1914 (Colony and Protectorate of Nigeria), replaced by Ordinance No. 23 of 1943, Cap. 211, Laws of Nigeria (1948 ed.)

In 1954 a federal system of government was established in Nigeria. Four law districts, namely, the Eastern, Northern and Western Regions plus the Federal Territory of Lagos, were created each with its own High Court of Justice. The Regions each had legislative competence in respect of certain matters mostly on the residuary list while the Federal legislature, in addition to its federal powers, was responsible for the exercise of legislative powers in respect of the Federal Territory of Lagos. The application of English law was made possible in the Regions and the Federal Territory of Lagos by substantially similar but slightly differently phrased reception clauses as in the Supreme Court Ordinance, 1914. As a result of the tremendous amount of argument that the interpretation of these clauses has generated, it will be necessary to set out in full their provisions in the different law districts of Nigeria. Starting with the Federal enactment on this matter, section 45(1) of the Interpretation Act [34] provides:

> "Subject to the provisions of this section and except in so far as other provision is made by any Federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall be in force in Lagos and, in so far as they relate to any matter within the exclusive legislative competence of the Federal legislature, shall be in force elsewhere in the Federation."

The Northern Nigeria High Court Law [35] by section 28 provides:

> "Subject to the provisions of any written law and in particular of this section and of sections 26, 32, and 35 of this Law -
>
> (a) the common law;
> (b) the doctrines of equity; and
> (c) the statutes of general application which were in force in England on the 1st day of January, 1900,

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34. Cap.89 (1958 ed.), Laws of the Federation of Nigeria.

35. No. 8 of 1955, replaced by High Court Law, Cap.49 (1963 ed.), Laws of Northern Nigeria.

> shall, in so far as they relate to any matter with respect to which the Legislature of the Region is for the time being competent to make laws, be in force within the jurisdiction of the court."

The Western Nigeria High Court Law [36] of 1955 adopted the provision of the Supreme Court Ordinance. A variation in formula was however introduced by the Laws of England (Application) Law [37] in 1959 when the Region compiled a list of English statutes of general application in the Region and re-enacted them as its own statutes. For the continued application of other types of English law in the Region the Law, at section 3, then provides that:

> "From and after the commencement of this Law and subject to the provision of any written law, the common law of England and the doctrines of equity observed by Her Majesty's High Court of Justice in England shall be in force throughout the Region."

The Eastern Nigeria High Court Law [38] retains the formula in the old Supreme Court Ordinance.

As pointed out above, the interpretation of these provisions has given rise to much dialectical discussion, mostly by text-book writers. As the purpose of the argument is to determine the extent of the basic common law (the private international law rules of which we are here concerned with) received into Nigeria, a short summary of the different views expressed on the reception clauses will be made. Our opinion on them will also be expressed.

The first interpretation is that the common law the Nigerian courts are required to apply, in view of or despite the provisions of the reception clauses, is as "applied to the common law countries", that is, "the legal system and habit that Englishmen have evolved. In this it is contrasted with systems of law

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36. No. 3 of 1955, s. 14.
37. Cap. 60, (1959 ed.) Laws of Western Nigeria.
38. No.27 of 1955, s.14 replaced by the High Court Law, Cap.61 (1963 ed.) Laws of Eastern Nigeria, s.15.

derived from the Roman Law". [39] According to this view, the Nigerian courts are not authoritatively bound by any specific version of English common law but are entitled to apply as a basic law, the universal system of the common law as found in the common law countries as a whole.[40]

As a matter of principle, we have already indicated[41] that the modern theory of territorial law actively encourages a comparative approach to the development of private international law through the adoption of uniform rules whatever be the source of such rules. The goal to which this aim is directed is that no two municipal courts shall be compelled by the systems of law they apply to reach different decisions on the same set of facts. To achieve this aim, however, it is not necessary to jettison clear provisions of municipal laws. Neither is it presupposed the simultaneous application of diverse foreign rules to a single set of circumstances. Surely a foundation must be laid before something is built on it. Even the most vociferous advocates of the international theory of sources of private international law recognise that positive norms of the lex fori are binding on the judges.[42] Our main objection to this type of interpretation is the regrettable tendency to sacrifice specific enactments of the Nigerian legislatures on the altar of development. The more recent of these reception clauses all speak of the "common law of England". Where they are less clear, the

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39. Nwabueze: Machinery of Justice in Nigeria (1963) p.21.
40. Ibid.
41. See supra, p. 20.
42. Savigny: System des heutigen roemischen Recht, Vol.8 (1849), pp.26 et. seq.; Zitelmann: Internationales Privatrecht, Vol. I, pp.2, 25 et seq.; cited by Kahn-Freund in "The Growth of Internationalism in English Private International Law", p. 7.

marginal notes, admittedly not forming part of the statutes,[43] at least offer permissible approach to a consideration of their general purpose. They too, all contain expressions "Extent of application of the law of England", [44] "How far the law of England in force" [45] or words to similar effect.

The impracticability of adopting a "universal" system of common law as a basic law in Nigeria is further illustrated by the wide divergence between rules of private international law, for instance, in England and the United States of America, both of which are common law countries. To give a few examples, first, in England there is a distinction between the laws that govern the formal requirements and the essential requirements of marriage. The former is governed by the lex loci celebrationis while the latter, as a general rule, is determined by the law of each party's domicile at the date of marriage. In the United States of America, however, this distinction is non-existent. A marriage is valid everywhere if the requirements of the law of the place where the marriage is contracted are complied with. Secondly, in the United States, a wife living apart is legally capable of acquiring a separate domicile for almost all purposes during the subsistence of the marriage; in England at present, this is absolutely impossible. Thirdly, turning to the content of the law of domicile, for quite a time the term "domicile" has meant different things in the two jurisdictions: the rules for its acquisition and loss, its retention and revival, have all gone

43. This assertion may be doubted in relation to Nigeria before the enactment of the Interpretation Act, 1964. Before then amendments to, and insertion of, side notes are actively considered by Nigerian Legislatures: See e.g. Northern Nigeria House of Assembly Debates, 4th Session, 10th - 17th March, 1955, p.29.

44. Northern Nigeria High Court Law, Cap. 49 (1963 ed.), s.28.

45. Eastern Nigeria High Court Law, Cap. 61 (1963 ed.), s.15.

their own different ways. And inside the United States itself, the question may be asked: how common is the common law between the states. The effect on Private International Law of the application of a universal system of common law as the basic law of Nigeria is that until there is a court's decision, reached after sifting all the applicable common laws, it will be impossible for any advice to be given on the law that should govern a particular transaction.

Our conclusion which is in keeping with the uninterrupted practice and usage of the Nigerian courts since 1900, is that it is the common law of England that was received as the basic law of Nigeria and not a universal system of common law obtaining in all the common law countries. It is submitted that Mr. Nwabueze's interpretation is contrary to express statutory provisions, difficult to operate in practice and constitutes a dangerous and unjustifiable encroachment, if accepted by the courts, on the legislative competence of the Nigerian legislatures.[46]

Limiting date of the received common law.

It is indisputable that the limiting date i.e. "1st day of January, 1900" indicated in the various reception clauses applies to the English statutes of general application. Whether the date equally is applicable to the "common law and the doctrines of equity" is debatable owing to the ambiguity of these provisions coupled with the different effective dates of the several enactments on them. The traditional view [47] based, inter alia,

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46. Cf. Allott: "Common Law of Nigeria" in "Nigerian Law, Some Recent Developments": I.C.L.Q. Supp. Pub. No. 10 (1965), p.31.

47. Ibid., p.38; and Allott: New Essays in African Law, p.32.

on the constitutional practice at the time the original statutes were passed and their consistent interpretation by the courts in former colonial territories, regards the limiting date as governing not only the statutes of general application but also the English common law and doctrines of equity. The result to which this interpretation leads us is that only English common law as it existed as on the first January, 1900, is of any authoritative effect on the courts of Nigeria. No doubt, post 1900 English decisions may still apply so long as they are decisions of the Privy Council [48] up to October 1963 adopting English common law principles as part of the Nigerian law.

On the other hand, any pre-1900 common law principle which is subsequently abrogated by an English statute or overruled by a later English decision will still apply in Nigeria. Support for this contention is afforded by the fact that in Nigeria, there are provisions which empowered the courts to exercise their jurisdiction in respect of certain matters[49] "in conformity with the law and practice for the time being in force in England". If the Nigerian legislatures, it is argued, had wanted to make a timeless reception of the English common law and the doctrines of equity, similar words could have been employed.[50]

There have been many objections, formidable enough in themselves, raised[51] against this interpretation. They are all offered to show that it is the current common law of England that is in force in Nigeria - a view which is also shared by some other legal writers on Nigerian Law. [52] The whole exercise of trying

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48. The Judicial Committee of the Privy Council ceased to be part of the hierarchy of Nigerian courts with effect from 1st October 1963.
49. See below
50. Allott: Essays in African Law (1960), p.31.
51. By Mr. Park, Sources of Nigerian Law, pp.20-24.
52. Kasunmu and Salacuse: Nigerian Family Law, p.14.

to discover the extent of the English common law received into Nigeria has even been dismissed as irrelevant by another text-book writer [53] who is of the view that it is the universal system of the common law that is operative in the country. A brief statement of these objections are:

(a) That the punctuation, even in the older reception clauses, clearly separates the common law from the English statutes of general application in Nigeria. The reception date therefore applies to the statutes only and leaves the common law as well as the doctrines of equity timeless. Agreeing that the older enactments are ambiguous, the ambiguity, it is claimed, have been resolved by the much more recent Regional provisions. For example, the Northern Nigerian provision makes a list of the three types of English law received into the Region, while the Western Nigerian enactment contains no limiting date at all;

(b) That on the principle of the immutability of the common law, it is unreal and inconsistent with authority to give the common law a limiting date; and

(c) That the judges in Nigeria have assumed that it is the current common law of England that applies in Nigeria by their consistent application of English precedents after 1900.

These objections have been adequately analysed and found not convincing in a recent work.[54] We may, however, add that a loose strand which constitutes a great flaw in the above objections

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53. Nwabueze: Machinery of Justice in Nigeria, p.22.

54. Allott: "Common Law of Nigeria", op.cit., pp.37-42; See also Allott: New Essays in African Law, pp.55-69.

is that they all fail to recognise the historical factors leading to the successive "reception" of English law in Nigeria as a whole. We have already shown that, unlike most Federations, where several independent states were brought together to form a type of association, Nigeria was a single nation and hence a single legal unit, operating throughout the country the English common law introduced by the Supreme Court Ordinance, as its basic law, before the unique Constitutional arrangement of 1954, whereby separate legal units were carved out of a single geographical area. The necessity for new enactments on the reception of English law in all the component parts constituting separate law districts of the Federation of Nigeria, therefore, arose as a result of the 1954 Constitution. In the case of Federal enactment, the purpose was to adapt the existing laws so as to bring them in accord with the provisions of the Constitution relating to the distribution of powers between the Federal and the Regional legislatures. It is of interest to note that Section 45 (1) of the Interpretation Act [55] was inserted by the Adaptation of Laws (Judicial Provisions) Order, 1955, [56] made by the Governor-General under powers conferred on him by section 57 of the Constitution. In the case of the Regional enactments, section 142 of 1954 Constitution empowered each of the Regions to enact laws for the establishment of a High Court of Justice in substitution for the old Supreme Court whose jurisdiction had extended over all parts of the country. Consequently, it was necessary to provide for the laws that should be applied by these Regional courts.

The pertinent question that must be asked in construing these new provisions is: Are they made with a view to continuing

55. Cap. 89 (1958 ed.), Laws of the Federation of Nigeria.
56. Legal Notice No.47 of 1955, Laws of the Federation of Nigeria.

or altering the existing laws in the different law districts established under the Constitution? To deal first with the Interpretation Act, it is our contention that the correct approach is for the whole of section 45(1) to be read as a whole. It is clearly wrong to start with a pre-conceived idea of its meaning, based on the supposed practice of the Nigerian courts, and then by construction to work that idea into the clause. As admitted by Mr. Park, the Supreme Court Ordinance, 1914,[57] which the Interpretation Act replaced, has been commented upon as far back as 1928 by Patrides, J. in Solomon v. African Steamship Co.[58] where he said:

> "The statutes of Limitation .... were statutes of general application in force in England on January 1, 1900, and they, in common with other statutes of general application which were in force on that date, are, together with[59] the common law and the doctrines of equity which were in force in England on the same date, in force within the jurisdiction of this court by reason of section fourteen of the Supreme Court Ordinance."

In our view, the words of section 45(1) of the Interpretation Act[60] smacks of an adoption of Patrides, J's language rather than a deviation from it. The point which arises for serious consideration is whether a delegated legislation, albeit in the form of an Order made by the Governor-General, which re-enacted the provision of an earlier Ordinance in similar terms, should be presumed to have changed the construction previously placed by the courts on the earlier enactment without the words of the new legislation pointing unmistakably to such conclusion.[61] In any

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57. Replaced by Ordinance No.23 of 1943, Cap.211, Laws of Nigeria, (1948 ed.).

58. (1928) 9, N.L.R. 99 at p.100.

59. Emphasis supplied.

60. Compare text, supra, p. 28.

61. In Rotibi v. Savage (1944) 17 N.L.R. 77, it was held that a new wording of a subsequent Act does not alter the meaning previously placed on an earlier enactment.

event, section 57(5) of the Constitution only empowered the Governor-General to make adaptations and modifications of the existing federal (National) legislations so as to bring them into accord with the federal structure created by the Constitution. It did not authorise him to alter the meaning previously placed on the existing legislations. The provision of section 57(5) of the 1954 Constitution, it is submitted, precludes an interpretation which will make the Governor-General's Order ultra vires the powers conferred on him to be placed on it. It is therefore not surprising to observe that the Attorney-General of the Federation, in explaining the section of the Interpretation Act, stated that the English law in force in Nigeria is the "common law, the doctrines of equity and statutes of general application up to 1900".[62]

Turning to the Regional enactments, attention may be drawn to the Parliamentary history of the Regional High Courts Laws and the policy statements leading to them not as an aid to their interpretation but to show the state of the law and the desire to preserve the scope of the received common law in the Regions when the Laws were passed. Starting with the controversial Northern Nigeria High Court Law, it was explained that the Bill leading to it

> "seeks to preserve the judicial system established by the Supreme Court Ordinance 1943 which came into effect in 1945. The court, however, had full and complete jurisdiction all over Nigeria, whereas the High Courts which are to be established in the Regions will have jurisdiction limited in a way which I will describe later, certain special jurisdiction in federal and other matters having been reserved by the Constitution to the New Federal Supreme Court which will shortly be established. An examination of the Bill will disclose many clauses which have been repeated from the old Supreme Court Ordinance." 63

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62. Debates of the Federal House of Representatives, 1st Session, 17th-30th August, 1955, pp.117-118.

63. Northern Region, House of Assembly Debates, 4th Session, Pt.II, 10th - 17th March, 1955, p. 29.

One of such repetitions was clause 29 of the Northern Nigeria High Court Bill, 1955. At the Committee stage, however, an amendment was proposed by the Attorney-General for the insertion of the words "in so far as they relate to any matter with respect to which the Legislature of the Region is for the time being competent to make laws" so as to provide, according to him, for greater clarity for those who will have to work the law and to enable them to appreciate the limitations on the jurisdiction of the Regional Court. The approved amendment which ultimately became section 28 of the High Court Law [64] appears to have listed the three types of the received English law, not with an intention to alter the existing law, but for purposes of convenience so as to incorporate new words denoting the extent of matters with respect to which the Regional legislature was competent to make laws.

The official report on the Western Region High Court Law, 1955, is more instructive. It states:

> "This Bill is not a controversial Bill. It follows, almost section for section, the Supreme Court Ordinance. If members will take pains to compare the present Bill with the Supreme Court Ordinance they will find that the points of departure are only two." [65]

The first, it was explained, related to the salary and tenure of office of the Regional High Court Judges, and the second concerned the provision conferring on the High Court original jurisdiction in land matters. It could, therefore, be seen that it was not by accident that section 14, like its counterpart in the Eastern Region High Court Law, 1955, contained virtually identical terminology with the Supreme Court Ordinance. Four years

64. No.8 of 1955.

65. Western Region, House of Assembly Debates, 2nd Session, Oct.-Dec., 1954, p.75.

later, when the statutes of general application applying in the Region were consolidated and re-enacted as the Laws of Western Nigeria, the Minister of Justice, after reiterating the need for consolidating all such English statutes, went on to say that the aim of the proposed Law was to provide "that the common law of England and the doctrines of equity will continue to apply to this Region".[66]

Furthermore, owing to the unusual emphasis placed on these Regional reception clauses as pointing conclusively to the view that it is the current English common law that is applicable in Nigeria,[67] attention may be drawn to the relevant provisions of the 1954 Constitution which sought to preserve uniformity of legislations at the inception of federalism in Nigeria in respect of all existing laws in all the different jurisdictions created under the Constituttion. Thus by section 58(1) of the 1954 Constitution, it was provided that;

> "If any law enacted by the Legislature of a Region ..... is inconsistent with any law enacted by the Federal Legislature, then, to the extent of the inconsistency, the law enacted by the Legislature of the Region, ... if enacted before the law enacted by the Federal Legislature, shall cease to have effect and if enacted after the law enacted by the Federal Legislature, shall be void."

The above Constitutional requirement, it is submitted, precludes a different interpretation being placed on the Regional reception clauses. Otherwise they will all be void or cease to have any effect.

A re-examination of the most appropriate interpretation of the new reception clauses in the light of Constitutional and Parliamentary history of the High Court Laws, and the policy statements leading to them confirms the view expressed by

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66. Western Region, House of Assembly Debates, No.14 of 4th -6th Febr., 1959.

67. See, e.g. Park: Sources of Nigerian Law, p.21; Nwabueze: Machinery of Justice in Nigeria, p.22; Kasunmu and Salacuse: Nigerian Family Law, p.14.

Professor Allott that the new provisions effected no fundamental change in the extent of the English common law originally received into Nigeria. They are merely declaratory of the existing law when they were passed.

Our conclusion, therefore, is that it is the common law of England as at 1st January, 1900, and consequently its rules of private international law as at that date that were imported into Nigeria. An interpretation that it is the current common law of England that is transported into Nigeria is undesirable and objectionable. It is contrary to constitutional principles and inconvenient in the sense that it unusually ties Nigerian courts to the apron strings of the English courts. It suggests that the Nigerian judges are not competent to develop the basic law received into the country in accordance with the national requirements. Indeed, an adoption of this view, coupled with Mr. Park's Pure Theory of English Law [68] appears a real danger which may give rise to stagnation in legal thought. For on this basis, Nigerian judges are no more than a collection of judicial instruments for the mechanical application of a ready-made English common law, from day to day. It is therefore rejected.

2. SPECIFIC ADOPTION OF A PARTICULAR BRANCH OF ENGLISH LAW.

Another instance of the statutory foundation of English rules of private international law in Nigeria is through Nigerian legislations adopting a particular branch of the English Law. Section 4 of the State Courts (Federal Jurisdiction) Act [69]

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68. See infra, p. 47.

69. Cap. 177, Laws of the Federation of Nigeria, (1958 ed.) replacing as to matrimonial causes the Supreme Court Ordinance, Cap. 211 (1948 ed.) Laws of Nigeria, s.22; See also High Court of Lagos Law, Cap.80, Laws of the Federation of Nigeria, (1958 ed.) s. 16.

provides that

> "The jurisdiction of the High Court of a State in relation to marriages, and annulment and dissolution of marriages and in relation to other matrimonial causes shall, subject to the provision of any laws of a State so far as practice and procedure are concerned, be exercised by the court in conformity with the law and practice for the time being in force in England."

Marriage and matrimonial causes are, by section 2 of the Act, defined with reference to "Christian" or monogamous marriage.

The above provision is once again illustrative of the unsatisfactory method of drafting often found in Nigerian legislations. Consistent with the words of the section, it may be argued that this provision only empowers the courts to exercise jurisdiction in conformity with the law and practice in England but does not require them to apply the substantive English law in relation to the matters enumerated. The law, in England, relating to jurisdictional requirements in divorce and other matrimonial causes is entirely different although part of the same genus, from the substantive law dealing with the mechanics of divorce and other matrimonial causes. The former is predominantly judge-made, with occasional legislative incursions designed to eliminate hardships and correct injustices created by the common law rules in this respect.[70] The latter comprises entirely of statutory enactments, starting with the Matrimonial Causes Act, 1857, which had been the subject of modifications, alterations and replacements by subsequent legislations[71] to cater for the changing social attitudes of the English people.

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70. See s. 13, Matrimonial Causes Act, 1937, as amended by Matrimonial Causes Act, 1950, s.18: now replaced by Matrimonial Causes Act, 1965, s.40.

71. Matrimonial Causes Acts, 1923, 1937, Matrimonial Causes (War Marriages) Act, 1944, Matrimonial Causes Acts, 1950, 1963 and 1965.

Also, when it is remembered that there is in existence a spatially inadequate Nigerian Marriage Act [72] dealing with the substantive law of monogamous marriages, it will be seen that the provision cannot imply the reception of the totality of the English law on "marriages, and ..... matrimonial causes".

The provision has, however, been taken by the Nigerian judges as entitling them to apply both the jurisdictional and the substantive English law, from time to time,[73] at least in divorce and other matrimonial causes.[74] No other course seems open to them in so far as the Nigerian Federal Legislature has not considered it necessary to enact its own law as regards the dissolution of monogamous marriages. For the moment it is obvious to the fact that the law of divorce, like that of marriage or succession, is a branch of the legal system deeply rooted in the popular conscience and in which the national character of the people expresses itself more vigorously than in any other field of law. In other words, it is undesirable and ludicrous for the law of a foreign country which takes no account of the social conditions of the people of Nigeria to be foisted on them by the legislature. If Dean Roscoe Pound could point out that "the widest difference between English law and American law and as between the law of any one of the United States and any other is as to divorce" [75] and one recalls that this diversity relates to the dissolution of the same type of institutional

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72. Cap.115, Laws of the Federation of Nigeria.

73. Presumably on the authority of Taylor v. Taylor (1935), 2 W.A.C.A., 348 in which a similar provision in s. 16 of the Supreme Court Ordinance, Cap.3, Laws of Nigeria (1923 ed.) was held to effect a timeless reception of English law in probate matters.

74. Odiase v. Odiase [1965] N.M.L.R. 196 at p.198.

75. "The Development of American Law and Its Deviation from English Law", 67 L.Q.R. 49 at p.64.

marriage known to, and practiced by, peoples of the same civilisation and social outlook, one should be surprised to observe that there is no local legislation on divorce of monogamous marriages in Nigeria and that the divorce law of Nigeria changes with the several mutations of the English law. Indeed, the Nigerian judges are finding it rather intolerable to apply English law on divorce to the dissolution of a Nigerian monogamous marriage, the formation and subsistence of which are usually attended with customary law observances. The injustice of such arrangement led Sowemimo, J. in the Lagos case of Ubeku v. Ubeku [76] to observe as follows:

> "My attention had been drawn to some English authorities on what is known as cruelty. Whatever may be the connotation which that word carries, the circumstances of its applicability in England must be distinguished from that obtaining in Nigeria. A background to a marriage in England is quite different to that in Nigeria and this particular case is an instance of the difference. Here is a [monogamous] marriage between two individuals, who had not been previously in love, but according to customary law could be married on the consent of the bride's parent on payment of dowry by the would-be husband. We have always got to look on this background in applying English law to [the dissolution of a monogamous marriage contracted under] our out-moded Marriage Act."

The crux of this matrimonial dispute was that both parties found to their consternation after an arranged monogamous marriage, which was not preceded by a period of courtship, that they were unsuited to each other. The wife, by reason of her further education in England for which the husband was responsible, prevented (perhaps not deliberately, but quite effectively) the husband from being "the master in the home". In other words, she insisted that no member of the husband's extended family should invade the matrimonial home unannounced and without her prior permission.

76. Unreported, Lagos High Court, Suit No. HD/52/67 of 17/6/68.

The husband felt that the wife was overstepping the bounds of Nigerian custom as regards matrimonial relations, monogamy or no monogamy. He was also of the opinion that she was being unappreciative of the dowry paid on her behalf and the cost of her further education which he bore quite willingly. He reacted accordingly. To adapt slightly the words of Sowemimo, J., the result was that "the marriage broke down completely".[77] The learned judge then went on to say: "I asked the wife who is a young girl whether she was prepared to give the marriage a further trial but she replied that she had made up her mind about it and she was not prepared to go back to the matrimonial home". In these circumstances, the judge granted a decree dissolving the marriage. But rather than dissolving the marriage on the main ground permitted by customary law, i.e. that it had irretrievably broken down,[78] he held that both spouses were guilty of cruelty as alleged by the petition and the cross-petition. This was done in order to satisfy the statutory requirement that he must apply English law for dissolving monogamous marriages.

In these circumstances, we must agree with the view expressed by Sowemimo J., in the case that there is a crying need for a change, first, in the Customary Law on marriage; secondly, in the statute which compelled High Court Judges in Nigeria to apply English law on divorce; and thirdly, the present Nigerian Marriage Act which is modelled on English law. It is, therefore hoped that the Federal Government, in conjunction with the respective authorities in the states, will consider the time ripe enough for the enactment of a composite matrimonial

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77. The words in the judgment read "the marriage has broken down completely."

78. Cf. Divorce Reform Act 1969 (England).

Statute that will reflect the social mores of the Nigerian people. In other words, a statute that will cater for the need of the growing number of persons for whom polygamy is an economic waste and, at the same time, respect the wishes of the majority for whom the institution is still a way of life. And to achieve this objective, the archaism of the laws of yesterday, e.g. the concept of arranged marriage or the principle of fixed grounds for divorce, should be discarded.[79]

To return to a more relevant part of the topic under discussion, it has been observed that the individual principles of private international law constitutes an integral part of the branch of law to which they relate. By the adoption of English law and practice in divorce and matrimonial causes, all the English conflicts rules concerning judicial jurisdiction, choice of law, and recognition of foreign decrees, in matrimonial causes, become operative in Nigeria. Thus in Arinze v. Arinze,[80] William J., having adverted to the fact that the Nigerian High Courts are by statute obliged to apply the law and practice in force in England as regards matrimonial causes, said:

> "Under the law of England, that part of the law which deals with jurisdiction [and] which is part of English Private International Law, makes it clear that in divorce matters the general rule is that the court has jurisdiction to hear petitions only where they are filed by persons domiciled within the geographical area of jurisdiction of the court".

This principle has been applied in a number of cases throughout the

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79. See now the Postscript for the present position as regards the law on Matrimonial Causes.

80. [1966] N.M.L.R. 155 at p.156.

federation [81] to determine the basis of the state's jurisdiction in divorce proceedings.

One final point about the specific adoption in Nigeria of English law on divorce is that any innovation introduced into the body of English private international law in this field, as distinct from other branches of the law, automatically applies in Nigeria. Thus, for example, the additional bases of jurisdiction in divorce and other matrimonial causes, introduced by section 40 (1) (a) (b) of the Matrimonial Causes Act, 1965, [82] become part of the Nigerian private international law as soon as they come into effect in England.[83]

3. LOCAL MODIFICATION OF THE RECEIVED ENGLISH LAWS.

The Nigerian judges have statutory powers to reject English statutes received as part of the Nigerian law by reason of their unsuitability to local circumstances or inconsistency with any Nigerian statute.[84] Also in applying the English statutes in Nigeria, they are to be read with such formal or verbal alterations not affecting the substance as to names, localities, offices, courts, etc., as may be necessary to render the statutes applicable to local circumstances.[85]

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81. Lagos: Shyngle v. Shyngle (1923) 4 N.L.R. 92; Jones v. Jones (1938) 14 N.L.R.12; Machi v. Machi (1960) L.L.R.103; Adeyemi v. Adeyemi (1962) L.L.R.70; Udom v. Udom (1962) L.L.R. 112; Odunjo v. Odunjo (1964) L.L.R.43.

    Northern States: Okonkwo v. Eze 1960 N.N.L.R.80; Adeoye v. Adeoye 1962 N.N.L.R.63; Arinze v. Arinze [1966] N.M.L.R. 155.

    Western States: Odiase v. Odiase [1965] N.M.L.R.196.

    Mid-Western States: James v. James, Unreported, High Court Suit No.W/32/63 of 25/4/64; Akhigbe v. Akhigbe, Unreported High Court Suit No. U/1/67 of 26/6/67.

    Eastern Nigerian States: Uzo v. Uzo, Unreported, High Court Suit No. E/4D/63.

82. Which replaced s.13 of the Matrimonial Causes Act, 1937, as re-enacted and amended by the Matrimonial Causes Act,1950, s.18.

83. See now, the Postscript; as regards the sources of Nigerian private international law on this topic.

84. See the Interpretation Act, Cap.89, Laws of the Federation of Nigeria, 1958 ed. s.45(2). Similar provisions are contained in the High Court Laws of some of the States.

85. Ibid., s.45 (3).

But in relation to the received common law, it has been conclusively shown that these statutory rules of interpretation are inapt to confer on the Nigerian judges similar powers to modify or reject the pre-1900 common law rules obtaining in the country.[86] Nevertheless, the question must be raised whether the courts can, and should, modify or reject common law principles of private international law received into the country because of their failure to take account of local circumstances or because of the differences in the legal institutions in England and Nigeria.

Characteristic of the Nigerian law, there have been for some time two schools of thought as to the relative position of the received English law in a predominantly customary law environment. One school, which may be termed "The Pure Theory of English Law", maintains that the English common law, and consequently all rules of private international law derivable from it, should be applied in its full strength and rigidity, without modifications, and with all its technicalities. The argument is that the courts, in the interest of predictability and the preservation of the system, must occasionally decide cases in a way that they would want to avoid. That is, if injustice is caused by strict adherence to the English common law rules, then the problem must be remedied by legislation and not by adjusting the received common law to local circumstances. The duty of the court, it is claimed, is not to administer justice but to enforce law. Moreover, the circumstances under which the Nigerian courts will be forced by slavish adherence to English common law to produce unjust results are rare since the rules of common law are not harsh[87]

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86. Park, op.cit., pp.36 and 37.

87. Park: Sources of Nigerian Law, p.39.

The other school of thought maintains that when the English common law is in danger of causing injustice and producing irrational results which are neither in accordance with convenience, common sense and justice, then the technicalities and doctrines which produce these results should, even in the absence of express provisions, be trimmed away and shaped to meet local circumstances so that justice may be done. "Otherwise the application of English law would be stultified and the legal system would be brought into justifiable contempt." [88]

Many objections may be levelled against the first contention from the point of view of private international law. It is proposed, however, to consider in brief only two of them. The statement that a court is not empowered to administer justice but to enforce law, if accepted in argument, would be a matter of surprise to a private international lawyer, not only in the common law world but also in the civilian countries. For the general policy consistently being pursued by judges and legislatures alike in the development of conflicts rules is to ensure fairness, convenience and justice.[89] Otherwise, nothing prevents any national court from deciding matters involving foreign elements brought before it solely with reference to the municipal law, thereby disregarding any foreign law that may be applicable. But the hardship to commercial life and injustice to people that such an insular approach will entail make it not feasible.

The second objection concerns the assertion that the situations are rare where the strict application of the common

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88. Allott: Essays in African Law (1960) p.25. Cf. Roberts-Wray: "The Adaptation of Imported Law in Africa", 4 J.A.L. (1960), p.68.

89. See e.g. Graveson: "Judicial Justice as a Contemporary Basis of English Conflict of Laws" in Twentieth Century Comparative and Conflicts Law (1961) pp.307-320. See also, Graveson: "Philosophical Aspects of the English Conflict of Laws", 78 L.Q.R.337 at pp.354-356; Lazar, "Phillips v. Eyre Revisited" in 32 M.L.R. (1969) 638.

law of England will yield unjust results in Nigeria.. The assertion is too general and sweeping that the common law is not full of harsh rules. It is submitted that strictly applied in a far-off land, where social attitudes are different, its principles of "manifest justice" may produce manifest injustice. In the field of private international law, a few illustrations of English conflicts rules that would be unsuited to Nigerian or African conditions will be given. Although there was an initial tendency on the part of English courts to disregard polygamous marriages for most purposes on the basis that it was "a union falsely called marriage",[90] in the words of Professor Cheshire, this "disdainful attitude"[91] had long been abandoned. English courts have progressively moved towards equating polygamous marriages with monogamous marriages for certain purposes and consequences as well.[92] But there remains some vital exceptions. In the first place, parties to polygamous marriages are still unable to seek the aid of the English courts for most matrimonial remedies or reliefs, on the basis that the machinery of English courts is constructed with a view to adjudication only in respect of monogamous marriages.[93] Secondly, children of polygamous marriages are precluded under English law from inheriting certain types of land[94] and barred from succeeding to titles of honour.[95] Obviously, the succession restrictions are rules of English domestic law which have been carried into English

90. Harvey v. Farnie (1880), 6 P.D.35 at p.53.
91. Cheshire: Private International Law, (7th ed.) p.273. [1965]
92. See e.g. Baindail v. Baindail [1946] P.112; Shahnaz v. Rizwan/ 1 Q.B. 390; [1964] 2 All E.R. 993; Mohamed v. Knott [1968] 2 W.L.R. 1446; Din v. National Assistance Board [1967] 2 Q.B. 213: [1967] 2 W.L.R. 257.
93. Hyde v. Hyde (1866) L.R. 1 P. & D.130; Sowa v. Sowa [1961]P.70.
94. Birthwhistle v. Bardill (1840) 7 Cl. & F.895.
95. Sinha Peerage Claim [1946] 1 All E.R.348.

conflicts rules. Since such rules of succession are not known to Nigerian law, it becomes clear that that alone will make their application in Nigeria not justifiable. Moreover, the last of the restrictions is a common law rule established after 1900,[96] and hence has no binding effect on Nigerian courts. But that notwithstanding, should the Nigerian High Courts accept the jurisdictional limitation in matrimonial proceedings concerning polygamous marriages because of the reception of the English common law in Nigeria?

According to the view expressed by Park, the answer should be yes since the Nigerian courts have no statutory powers to modify or abrogate any common law rules, as opposed to their powers to make formal alterations to English statutes received into the country. In so far as only the High Courts, in many of the Nigerian states, have jurisdiction over persons who are not Nigerian subjects, the result would be a refusal to assume jurisdiction to dissolve polygamous marriages contracted by foreigners.[97] The fact that Nigerian parties to such marriages can pursue their matrimonial rights and remedies in the Customary Courts will be considered immaterial. The effect of such rule will be the introduction of a curious phenomenon into the Nigerian private international law, i.e. that of complete inequality between foreigners and Nigerian subjects in the enjoyment of matrimonial rights!

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96. Supra, p.40.
97. For a full discussion on this point see, Chapter 4.

Confronted with this absurd situation which cannot be averted unless Nigerian judges exercise their inherent powers to modify or reject unpalatable principles of the received English law both in this and other branches of the law, a pure theory of English law is not capable of support. Moreover, when one recalls that the English private international law is of relatively recent development, that the early English judges

> "worked on virgin soil, ... that their decisions were necessarily hesitating and tentative [98]

and that few English decisions

> "over a century old are of great value or authority at the present time" [99]

in this branch of law, what justification is there for expecting Nigerian judges to stick faithfully and diligently to these same pre-1900 common law decisions which, in England, are constantly being reformed on all fronts?

4. FEDERAL CONSTITUTION

Constitutional provisions relating to private international law in a country having many political affiliations invariably concerns inter-state or intra-national as well as, but rather more than, international conflicts. This cannot but be so on the basis of the territorial theory of law, in this respect both historically and currently true, that a municipal statute, whatever its position in the hierarchy of the legal system, does not have extra-territorial effect beyond the geographical limits of the sovereign's territory. The significance of such Constitutional provisions in a federation of several states is that

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98. Cheshire: Private International Law, (7th ed.) p.38.
99. Graveson: The Conflict of Laws (6th ed.) p.7.

the system of private international law ceases to be predominantly concerned with the solution of transactions between parties on the international plane, but becomes a body of law for the regulation of both inter-state and international transactions. Also, at the inter-state level, the solution of conflictual problems as between the states may become inextricably bound with constitutional law. And it is with regard to the ascertainment of such constitutional solutions of problems of private international law at this level that, quoting the words of Professor Graveson, "we enter into a mixed questions of constituttional law and conflict of laws"[1] and with respect to which Professor Ross [2] has asked whether the inter-state conflict of laws in America has not become a branch of constitutional law. Our inquiry in this respect is to discover whether any rules relating to the solution of inter-state conflicts exist in the Nigerian Federal Constitution or any federal statutes implementing such constitutional provisions. This in turn necessitates a short but up to date survey of the features of federalism in Nigeria.

We have already noted that Nigeria ceased to be under a unitary system of government from 1954. In that year, practical necessity, sharply brought to mind by separatists' activity, impelled the fragmentation of the country into four parts, each with a certain degree of autonomy. The 1954 Constitution provided for the creation of three regions and a federal territory of Lagos.[3]

1. Graveson: Conflict of Laws (5th ed.) p.79, 6th ed. p.93.
2. Ross: "Has the Conflict of Laws Become a Branch of Constitutional Law?" 15 Minn. L. Rev. 161 (1931).
3. The Constitution, at s. 3, also provided for the establishment of Southern Cameroons as a territory of the Nigerian Federation. This territory however had ceased to be part of the Federation of Nigeria.

Judicial and legislative powers were shared between the Federal government and the Regional governments, while the Federal Parliament was empowered to legislate for and on behalf of the Territory of Lagos. On 9th August, 1963, a fourth Region - the Mid-Western Region - was carved out of the former Western Region of Nigeria.[4] Pursuance to the provision of section 147 of the 1954 Constitution, a Supreme Court, as the final court of appeal in Nigeria, was established,[5] and by section 149 all the processes and orders made by the Supreme Court are to be effective throughout the Federation.

The legal separation of the Regions and the Federal Territory of Lagos as distinct units within the Federation was secured by section 142 of the 1954 Constitution which authorised each of the units to enact laws for the establishment of a separate Court of Justice, especially a High Court of Justice. This position is further emphasised by the provision of section 4 of the Federal Supreme Court (Appels) Act[6] the effect of which is that the Supreme Court, on appeals from the regions and the territory of Lagos, functions as the court of the law district from which the appeal is taken. This arrangement was continued under the 1960 Independence Constitution and the Republican Constitution of 1963, both of which in addition secured to every citizen of Nigeria the right to establish himself anywhere within the Federation.

The federal Parliament was also empowered by section 126

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4. By the Mid-Western State Act, 1962 (Fed. Act, No.6 of 1962), S.1
5. By the Federal Supreme Court (General Provisions) Act, Cap.68, Laws of the Federation of Nigeria.
6. Cap.67, Laws of the Federation of Nigeria (1958 ed.).

of the 1963 Constitution to establish federal courts of first instance for the enforcement of federal laws. It will be pertinent to observe, however, that no such courts have so far been established. The federal government has contended itself with investing the administration of federal laws in state courts.[7] It is almost gratifying to note that the federal Parliament's lack of enthusiasm for exercising its constitutional powers in this respect has, for the moment, neatly sovled the problem of diversity of jurisdiction, that is, the question as to which court has jurisdiction over a particular matter. A prospective litigant or petitioner needs not, unlike the United States or to a certain extent in Australia, concern himself with ascertaining which court is federal or state. With the exception of matrimonial causes,[8] to confer jurisdiction, he simply institutes proceedings in the court of the state in which he is resident or where the defendant can be found, thereby leaving the court with the determination of the applicable federal or state law.

The significance of these constitutional provisions on private international law at the inter-state level has been aptly illustrated by certain decisions of the Federal Supreme Court. The statement of Jibowu, Ag. C.J.F. in British Bata Shoe Co. v. Melikian[9] that as a result of the regionalisation in Nigeria and the establishment of High Courts in the various Regions

7. Excluding State Customary Courts; see State Courts (Federal Jurisdiction) Act, Cap.177 (1958 ed.). The establishment of Federal courts in the states in the foreseable future appears a remote possibility in view of the last upheaval in the country. Even after the cessation of hostilities, the resources of the Federal government are, certainly, needed for the more urgent problem of reconstruction.

8. See Chapter 4, infra.

9. (1956) 1 F.S.C. 100 at p.102.

which are separate and distinct from one another, "each region is like a foreign country to any other region" compares, although less forcibly, to that of an Australian judge that "for the purposes of private international law, South Australia is a foreign country in the courts of New South Wales".[10] Also, in Lanleyin v. Rufai [11] the foreign nature of the Nigerian Regions to one another was further emphasised by the Federal Supreme Court when it was held, following the English decision in The British South African Co. v. The Companhia de Mocambique,[12] that the Lagos High Court had no jurisdiction to entertain an action to recover damages for trespass to land in Western Nigeria. Western Nigeria was, for purposes of the jurisdiction of the Lagos High Court, equated with a foreign country.[13]

The above survey shows the features of federalism in Nigeria and the separate legal life of the Regions up to January, 1966, when, as a result of two military Coups d'etat, Military Governments replaced, both at the Federal and Regional levels, the civilian governments in the country. The Federal Parliament and the Regional Legislatures were suspended. Legislative powers, as regards federal matters, become exercisable by means of Decrees signed by the Head of the Federal Military Government; while in the case of Regional matters, by Edicts issued by the Regional Military Government.[14] The Federal and the Regional Constitutions of 1963 have since then undergone several processes

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10. Chaff and Hay Acquisition Committee v. J.A. Hemphill and Sons Ltd. [1947] 74 C.L.R.375 at p.396 per Williams, J.
11. (1959) 4 F.S.C.184.
12. (1893) A.C.602.
13. See also Ijaola v. Banjo (1958) L.L.R. 56; Owe v. Owe, Unreported, Lagos High Court, Suit No.LD/13/66 of 5/9/66.
14. See The Constitution (Suspension and Modification) Decree, No.1 of 1966.

of matamorphosis. They were partly abrogated, in part suspended, modified, repealed and restored. The net result is that the Federal Republican Constitution of 1963 has been subjected to systematic degrees of amendments by Decrees, not less than twenty within the past four years. The interpretation of several provisions in it will require the considered opinion of a constitutional lawyer. The federal system of government itself was superceded by a unitary one [15] for about three months and then reconstituted [16] as it was before. Of more importance to the purpose of our study is the States (Creation and Transitional Provisions) Decree of 1967 [17] which creates twelve new States in place of the former Regions and the former Territory of Lagos. [18] Turning, then, to this recent constitutional amendment, an attempt will be made to discover how far the separate legal life of the new States vis-a-vis the former Regions has been preserved or restricted; how far their integrity as separate law districts has been affected.

By section 7(2) of the States (Creation and Transitional Provisions) Decree (which for convenience will henceforth be referred to as the "States Creation Decree"), it is provided that all references in the Constitution and the Interpretation Act, 1964 to "Region" should be construed as references to a State created under the Decree. Also by section 7(3) of the Decree the former "Federal Territory" of Lagos becomes a "State within the meaning of the States (Creation and Transitional Provisions)

15. By the Constitution (Suspension and Modification)No.5 Decree, No. 34 of 1966.

16. By the Constitution (Suspension and Modification) No.9 Decree, No.59 of 1966.

17. No. 14 of 27th May, 1967.

18. These new States are the North-Western; North-Central; Kano; North-Eastern; Benue-Plateau; Central-West, which is now known as Kwara State (See Central-West (Change of Name etc.) Decree, No.7 of 1968); Lagos: Western: Mid-Western; Central-Eastern; South-Eastern; and Rivers.

Decree, 1967". An amendment [19] to the States Creation Decree further provides, at section 1 (b), that:

> "For the avoidance of any doubt, ---
>
> the reference to "Region" in section 7 (2) of the Decree aforesaid [the States Creation Decree] shall in addition to the meaning to be assigned to it in the Constitution of the Federation be construed and have the like meaning where it occurs in any enactment."

This amendment, which applies to all enactments throughout the Federation,[20] was made to have retrospective effect/from the date the twelve states structure was made, that is, 27th May, 1967. All the existing law in the Region out of which a State was created is made applicable, subject to any modifications necessary to bring it into conformity with the provisions of the States Creation Decree, in the new State.[21] At first blush, it might be concluded that the new States, by virtue of the above provisions of the States Creation Decree, simply stepped into the shoes of the former Regions and assumed all the powers - legislative, executive and judicial - of the former Regions. The Decrees as to the powers of the new States, however, cast some doubts on such conclusion.

Details of the legislative and executive powers of the Federal Military Government vis-a-vis the former Regional Military Governments, as spelt out in the Constitution (Suspension and Modifications) Decree, No.1 of 1966; were made applicable to the new States by the Constitution (Repeal and Restoration) Decree of 1967.[22] Section 3(1) of the Decree (No.1 of 1966) provides that "The Federal Military Government shall have power

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19. States (Creation and Transitional Provisions) (Amendment) Decree, No.19 of 1967.

20. Ibid., s.2.

21. States (Creation and Transitional Provisions) Decree, 1967, s. 1 (5).

22. Decree No.13 of 1967, as amended by the Constitution (Miscellaneous Provisions) (No.2) Decree, No.27 of 1967.

to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever".[23] At sub-section (3), the Military Governor of a State shall have power to make laws for the peace, order and good government of the State. He is not, however, entitled to make laws with respect to any matter on the Exclusive List.[24] Neither can he legislate on matters on the Concurrent List without the prior consent of the Federal Military Government.[25]

The effect of section 3 of the Decree No.1 of 1966, is obscure. For if the Federal Military Government has powers to make laws for any part of Nigeria "with respect to any matter whatsoever", nothing remains for the States to legislate upon. The provisions as to the legislative competence of the States are either nugatory or at least merely window-dressing. Indeed, on this basis Nigeria is a Federation only in name and a unitary State in practice. Perhaps a better interpretation of sub-section 3(1) of the Decree is that as a result of the upheaval, leading to the last civil war in the country, reserved powers are necessary on the part of the Federal Military Government to override any State law which undermines the interests of the nation as a whole. On this interpretation, then the previous arrangement under the 1963 Constitution whereby the Regions could make laws both on the residuary and the concurrent lists continues to apply to the States with the important distinction that the States could legislate on matters within the concurrent list only with the prior consent of the Federal Military Government. It appears that the purpose of this new device as to "prior consent" is to ensure a greater degree of co-ordination between Federal and State laws

23. Emphasis supplied.
24. The Constitution (Suspension and Modification) Decree, No.1 of 1966, s.3(2) (a).
25. Ibid., s. 3(2) (b).

on matters falling with the concurrent list. It also prevents the shifting of categories between Federal and State laws in that it precludes the possibility of some matters of state law becoming Federal law through subsequent federal legislation on them. The provision therefore constitutes a welcome and fundamental change in practice without in the least affecting the autonomy of the States.

Although these provisions are too recent to be the subject of judicial interpretation, the view expressed above appears to have been adopted by the different States. Thus some state enactments not falling within the legislative lists have been made. [26] The Edicts promulgating them were issued not by the Head of the Federal Military Government but by State Military Governors. Moreover, the Edicts do not appear to have been promulgated under any powers delegated by the Federal Military Government. Be that as it may, legislative competence is not the sole criterion for determining the identity of a territory as a legal unit. For example, the legislative competence of the United Kingdom Parliament in respect of England, Scotland and Northern Ireland does not destract from the fact that this group of territories are, in English private international law, separate law districts and consequently foreign

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26. See, eg. North-Western State: The Area Courts Edict, No.1 of 1967.

North-Central State: The Area Courts Edict, No.2 of 1967.

North-Eastern State: The Area Courts Edict, No.1 of 1968. High Court Law (Amendment) Edict, No.2 of 1968 Sharia Court of Appeal Law (Amendment) Edict, No. 3 of 1968.

Kwara State: The High Court Law (Amendment) Edict, No.1 of 1968. The Sharia Court of Appeal Law (Amendment) Edict, No.2 of 1968. The Area Courts Edict, No.2 of 1967.

Kano State: The Area Courts Edict, No.2 of 1967.

Benue-Plateau State: The Area Courts Edict, No.4 of 1968.

Lagos State: Lagos State (Applicable Laws) Edict, No.2 of 1968.

countries to one another. "A law district" and hence a foreign country in private international law, "means a district or territory which (whether it constitutes the whole or a part only of the territory subject to one sovereign) is the whole of a territory subject to one body of law".[27] With the establishment of separate High Court of Justice and other courts in most of the new States,[28] each State, for purposes of our study, is a separate law district and as such a foreign country to one another.

Having shown the legal separateness of the Nigerian States, attention must now be directed to the Constitutional provisions directed at solving problems of inter-state conflicts in the two important topics usually dealt with by such constitutional provisions. These are the jurisdiction of the courts and the enforcement of the laws and judgments of one State in the other.

With the common law as the basic law in all the law districts in Nigeria, the principle on which the Nigerian courts (including the customary courts[29] will assume jurisdiction in personam is, like that of the English courts, based on submission.[30] At common law, therefore, no State has authority to assume jurisdiction over persons who are absent from the State. To obviate the difficulties inherent in the common law basis of jurisdiction

27. Read: Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth (1938), p.6.

28. See supra, fn. 26.

29. Whose basis of jurisdiction in this respect derives from Statutory provisions. See e.g. the Western Nigeria Customary Court Law, Cap.31 (1959 ed.) s.22 (2) of which provides that "civil causes shall be tried and determined by a customary court having jurisdiction over the area in which the defendant was at the time the cause of action arose".

30. Dicey and Morris, op.cit., (8th ed.) pp.179-182.

at the inter-state level, section 151 of the 1954 Federal Constitution provided that:

> "(2)(a) The Federal Legislature may, by law enacted under this Order, make provision for....
>
> the service and execution in any Region or... Lagos of the civil and criminal processes, judgments, decrees, orders and decisions of the Federal Supreme Court and of any court in any other part of Nigeria, and the attendance of persons in any Region.... or Lagos at any such court."
>
> "(b) The Legislature of the Region may make provision for the service and execution in that Region of the civil and criminal processes, judgments, decrees, orders and decisions of any court, and the attendance of persons in that Region at any court." [31]

The above provisions have been characterized by Dr. Awa as the "full faith and credit clause" of the Nigerian Federal Constitution:[32] that is, a provision of the Federal Constitution which makes it obligatory for any of the States in the Federation to give full recognition to the Laws, processes and judgments of other States; the breach of which makes such non-recognition a violation of the Federal Constitution. The effect of the 1954 Federal Constitutional provisions he stated to be that the processes, judgments and, surprisingly, legislative enactments, of one region must be recognised and accepted at their face value in every other region.[33]

It is submitted that this analysis is clearly wrong. Compared, for example, with Article IV, Section 1 of the United

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31. For the current provision: see Item 22, Concurrent Legislative List, Schedule Part II, The Constitution of the Federal Republic of Nigeria, 1963 which replaced an identical Item in the 1960 Constitution.

32. Awa: Federal Government in Nigeria (1964), pp.186-187.

33. Ibid., at p.187.

States Constitution which requires the grant of full faith and credit to the acts, judgments and records of sister states, and the more effective section 118 of the Australian Constitution which provides that "Full faith and credit shall be given throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State", there is nothing compelling in the above Nigerian Constitutional provisions, or in those replacing them, to warrant their being termed a full faith and credit clause. The provisions only empower the Federal and State Governments to regulate, i.e. establish a procedure for, the service and execution of processes, and the enforcement of the judgments of one Region (now a State) in the other. Moreover, the provisions, as could be observed, do not even authorise the passing of legislative enactments either by the Federal or the State Legislatures for the recognition of the laws of one unit in the other. In the absence of implementing statutes, these provisions which are not more than enabling ones, standing by themselves, cannot give rise to any constitutional issue in the Supreme Court of Nigeria as in the United States of Australia.

The absence of a full faith and credit clause in the Nigerian Constitution is regrettable. It gives any of the Nigerian States unrestricted latitude to develop some whimsical doctrines of local public policy for refusing recognition to the statutes and other laws of the others. Whatever may be the position in international conflicts, it is absolutely undesirable that sister states in a Nigerian community with a common nationality, a common basic law and substantially the same legal institutions and social ideas, should be allowed to tread what at the inter-state level amounts to a dangerous and divergent path. With the introduction of new legal concepts unknown in other jurisdictions in some States,

it will be realised that the fear herein expressed far from being imagined is very real.[34] It cannot be too strongly urged that a full faith and credit clause, for example, on the Australian line, be entrenched in the future Federal Constitution of the country to ensure equal treatment to all citizens of Nigeria through reciprocal enforcement of the laws of one State in the other.

5. FEDERAL STATUTES.

(a) Jurisdiction in Personam.

It is significant to observe that all Federal legislations concerning inter-state conflicts arose as a result of constitutional provisions empowering the Federal Legislature to regulate such matters. In exercise of the powers conferred by section 151 of the 1954 Constitution, the Adaptation of Laws (Judicial Provisions) Order of 1955[35] was made which inserted a New Part VII into the Sheriffs and Civil Process Act.[36] Sections 95 to 103 of the Act deal with the service of the process of one State in the other. This enactment is effective throughout the Federation and obviates the necessity for any similar provisions by the State legislatures. Any writ of summons issued in one State may be effected in the other State as if the writ was served on the defendant in the State in which the writ was issued.[37]

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34. For example, only in the Lagos and the Eastern States is the concept of statutory adoption known; (see Chapter 7) As the Federal Constitution at present stands, nothing prevents any of the Northern States, where this concept is unknown, from refusing to give full effects to the adoption laws of these States.

35. Legal Notice No.47 of 1955.

36. Cap.189 (1958 ed.) Laws of the Federation of Nigeria.

37. Sheriffs and Civil Process Act, Cap.189 (1958 ed.) Laws of the Federation of Nigeria, s. 96 (2).

The appearance of the defendant gives the issuing State jurisdiction under ordinary rules of the common law, but in case of default the plaintiff may, by order of the court, proceed in the suit if it is made to appear to the court from which the writ was issued that the subject matter of the suit falls within one of the eight categories enumerated in section 101 of the Act. The clear and desirable purpose of this enactment is that the whole of the Federation is treated as a unit for purposes of service and execution of processes. On the inter-state level, these set of provisions which make the service of processes more efficacious in that no leave to serve out of the jurisdiction is necessary,[38] have displaced the rules of "assumed jurisdiction" introduced into Nigerian law by the English statute, the Common Law Procedure Act, 1852, which was classified a statute of general application by Abbott, J., in Ribeiro v. Chahin,[39] The provisions of the English legislation, which are now contained in the Rules of the High Courts of some States, can now, since Federation, be used for serving writs outside Nigeria.[40]

(b) Enforcement of State Judgments.

The provisions on the enforcement of State judgments, as we have already observed, derive from the same Constitutional source as those on the service and execution of processes. It is least surprising therefore that the implementing enactment should be the same Sheriffs and Civil Process Act.[41] Under the

38. See Okonkwo v. Okonkwo (1959) N.N.L.R.65.

39. (1954) 14 W.A.C.A.476.

40. E.g. Western and Mid-Western States: See the High Court Rules, Order IV, Rules 1 to 7;

Eastern States: High Court Rules, Cap.61 (1963 ed.) Laws of Eastern Nigeria, Order IX, Rules 13 and 15.

41. See ss. 104-112.

provisions of the Act, any judgment obtained in a State Court may be registered in another State by the person in whose favour it was given. Section 105 of the Act provides for the maintainance in each of the States, a Register called "The Nigerian Register of Judgments" Upon the production of a Certificate of judgment issued in the appropriate form by the court of a State giving the judgment, the receiving State must register the judgment by entering it in the Register of Judgments.

> "From the date of registration the certificate shall be a record of the court in which it is registered, and shall have the same force and effect in all respect as a judgment of that court, and the like proceedings may be taken upon the certificate as if the judgment had been a judgment of that court". [42]

"Judgment" in the Act is defined to include any judgment, decree or order given or made by a court in a suit whereby any sum of money is made payable or any person is required to do or not to do any act or thing other than payment of money.[43] It therefore covers, e.g., Judgments in divorce and other matrimonial causes, custody of a child, payment of alimony and any other decrees given in a matrimonial suit.

A great defect in the Nigerian provisions which makes them an uncritical and pedantic adoption of the Australian Service and Execution of Process Act,[44] on which they were based, is that despite section 151 of the 1954 Constitution and Item 22 of the Concurrent Legislative List in the 1960 and 1963 Constitutions, all of which authorise the Federal Government to establish by legislation a procedure whereby the "processes, judgments, decrees, orders and decisions ..... <u>of any court of law in Nigeria</u>" [45] will be enforced in the sister-states; the implementing statute, i.e. the Sheriffs and Civil Process Act, only applies to the processes and judgments of the High Court and the Magistrate's

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42. s. 105 (2).
43. s. 95.
44. 1901-1950 (Commonwealth of Australia statute).
45. Emphasis supplied.

Court as in Australia.[46] Consequently, the processes and judgments of Customary Courts are excluded. The unhappy result of this imperfect exercise of constitutional powers is that while the processes and judgments of a Magistrate's court must be mutually enforced in the sister-states, the processes and judgments, for example, of a "grade A" Customary Court in Southern Nigeria, or of a Sharia Court of Appeal in Northern Nigeria, whose judges are as professionally qualified as, and often more than, a Magistrate, are denied under the Act reciprocal recognition inter-state. It must be admitted that some State Customary Courts are obliged by state statutes[47] to accord recognition to the judgments and processes of other States' customary courts. The existence of such a provision in any state makes an exequtor process unnecessary before the judgments of other states' customary courts can be enforced in such state. However, it is our conviction that the regulation of the conflictual aspects of customary courts' processes and judgments should not be left to the enlightened self-interest of individual States. Apart from the fact that the provisions of the State enactments are not as effective as those of the Sheriffs and Civil Process Act, rules of inter-state recognition of judgments and processes are absent in some other States.[48]

Unless there is a uniform provision regarding these matters and with reciprocal effect throughout the States, a State

46. See ss. 95 and 105, Sheriffs and Civil Process Act, Cap.189.

47. See s. 40 of the Western Nigeria, Customary Courts Law, Cap.31 (1959 ed.); s.39 of the Area Courts Edict, No.1 of 1967, of the North-Western State. Similar rule is contained in the Area Courts Edicts of the five Northern Nigerian states, at identical sections.

48. The Three Eastern Nigeria States.

whose processes and judgments are not accorded similar treatment as it gives to other States' may be justified in engaging in a spirit of retaliation thereby rendering the State provisions valueless. It is submitted that the Federal authorities should amend the relevant parts of the Sheriffs and Civil Process Act so as to enable the processes and judgments of all customary courts to be mutually enforced in the sister-states as those of the High Courts and Magistrates' Courts. Otherwise the ill purported to have been removed, that is, that a person should not be allowed to evade his personal obligations by moving interstate, will still be present, in a substantial degree, in the country. The suggestion as regards the insertion of a full faith and credit clause in the Federal Constitution is also directed towards this goal.

(c) Marriage and Matrimonial Causes.

Until three years after the establishment of a federal system of government in Nigeria, it did not occur to the founding-fathers of the Nigerian Constitution that the field of marriage and matrimonial causes is the most fruitful aspect of private international law not only at the international but also at the state levels. The failure of the 1954 Constitution to provide for a uniform law in this respect was, however, rectified in 1957[4] when general powers in respect of these matters were taken out of the competence of the Regional legislatures and placed on the Exclusive List of the Federal legislature. This remedy is, howeve of a partial nature. Although the Marriage Act[50] and the Federal

49. By the Nigeria (Constitution) (Amendment No.2) Order in Counci of 1957, s.50 (1) (d): See now, item 23 of the Exclusive Legislative List, Part I of the Schedule to the Constitution of the Federal Republic of Nigeria, 1963; and s. 69 (2) of the Constitution.

50. Cap.115 (1958 ed.), Laws of the Federation of Nigeria.

enactment relating to matrimonial causes[51] are of universal application within the country, they relate exclusively to the celebration and dissolution of monogamous marriages. The Federal Acts still leave intact diversity of laws in respect of customary polygamous marriages and matrimonial causes regarding such marriages in State hands. Consequently, what constitutes the formal and essential requirements of customary law marriages, capacity of the parties to enter into them, the grounds or reasons for their dissolution, and the jurisdiction of the courts to dissolve them, are entirely state matters. Conflicts rules relating to them, also being state matters, vary from state to state.

6. STATE STATUTES.

Only in very rare cades do State statutes deal with specific rules of private international law. A notable exception to this is in the field of legitimation by the subsequent marriage of a child's parents with respect to which all State statutes [52] contain uniform provisions as to choice of law rules [53] and those for the recognition of the incidents of the status of legitimacy created by any foreign applicable law.[54] It must be observed, however, that uniformity of state legislations in this respect is due to the division of legislative powers between the federal and

51. State Courts (Federal Jurisdiction)Act, Cap.177, (1958 ed.) Laws of the Federation of Nigeria.

52. Lagos State: Legitimacy Act (Lagos), Cap.103, (1958 ed.) Laws of the Federation; Northern States: Legitimacy Law, Cap.63 (1963 ed.) Laws of Northern Nigeria; Western and Mid-Western States: Legitimacy Law, Cap.62, (1959 ed.) Laws of Western Nigeria; Eastern States: Legitimacy Law, Cap.75, (1963 ed.) Laws of Eastern Nigeria.

53. s. 9(1) in the above Legitimacy Laws which contain identical sections.

54. Ibid., s. 9(2).

State authorities during the two successive stages in the history of federalism in Nigeria. With legitimacy and legitimation becoming a residuary topic under the federal constitutional arrangement of 1954, each of the former Regions adopted and re-enacted the then existing national Legitimacy Act.[55] This process has again been indirectly repeated by the States (Creation and Transitional Provisions) Decree [56] by which all existing laws in the Region out of which a State was created automatically become the laws of the new State. As a "Marriage" in each of the States' Legitimacy Laws is defined solely with reference to monogamous marriage, it becomes clear that the provisions of the statute dealing with private international law rules of legitimation by subsequent marriage exclude legitimation by customary law marriage.

There are other statutes of the states which are of interest from the point of view of private international law. For instance, both the Eastern Nigeria Adoption Law, 1965 [57] and the Lagos Adoption Edict, 1968 [58] provide for the basis of the jurisdiction of the court of a state in adoption proceedings; while the Lagos Edict alone contains a rule on recognition of sister-state and foreign adoptions. Also, by the provision of the Western and the Mid-Western Nigeria Torts Law,[59] it may be confidently asserted that even though there are no adoption statutes in these two states, the incidents consequent on the status of adoption created by the law of a sister-state or a foreign country will, at least for certain purposes, be recognised in the states.

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55. Cap.**Lll**, Laws of Nigeria, 1948 ed. The Act was itself passed in 1929.
56. No. 14 of 1967, s.1 (5).
57. No. 12 of 1965.
58. No. 14 of 1968.
59. Cap. 122, Laws of Western Nigeria (1959 ed.) s.5 (c).

7. NIGERIAN CASE-LAW AND AUTHORS.

In all the law districts of the Nigerian Federation, English rules of private international law are generally followed. Although there are some Nigerian cases, emanating almost entirely from the field of matrimonial causes, their distinctive Nigerian characteristic lies in the adaptation of the English principles to accord with the federal division of powers in the country. Only occasionally has the difference in social habits and legal institutions in the country restrained the courts from giving too loyal adherence to the received English principles of private international law.[60] Only in rare cases is a side look cast on the legal systems of other countries for the development of this branch of law in Nigeria.[61] It must be admitted, however, that Nigerian judges, like their counterpart in other countries,

> "have conflict of laws cases before them far less frequently than local laws. [That] they rarely feel equally at home with the conflict cases, and they do not decide them and write their opinions with the same assurance and dependability as in other fields."[62]

The temptation to adopt English principles is very great and fascinating. English law is the basic law in Nigeria. Almost all Nigerian judges are trained in English Inns of Court or British Universities. Only a very insiginficant number of Nigerian legal personnel ever studies the conflict of laws on a comparative basis. We therefore lack the knowledge of other systems of private international law, apart from the English system, which is a sine qua non to the development of the municipal system in this field. It is not surprising, then, that there is

60. See Asiata v. Goncallo (1900), 1 N.L.R.42.

61. e.g. Benson v. Ashiru [1967] N.M.L.R.363.

62. Cheatham: "Problems and Methods in Conflict of Laws", 99 Recueil des Cours (1960), 247.

no literature on this subject; the extremely few contributions in legal periodicals being merely repetitive of the reasons adduced by judges in arriving at their decisions, agreeing or disagreeing with them in places, without offering any helpful suggestions [63] as to what the judges should do in future. Consequently, Dicey's Digest of English Conflict of Laws, the rules of which are not designed, in the words of its late author, for a country whose institutions "are utterly foreign to the institutions and habits of life in the admittedly civilised countries of the world" [64] continues to predominate in shaping rules of private international law in Nigeria, a country, which according to Dicey's definition, cannot be included in the "charmed circle of civilised countries".

CONCLUSION.

A common feature of Nigerian private international law as indicated by the various sources considered above is that it is all geared to the basic English law ideas and institutions received into the country. The tendency is that customary law and its legal institutions are being progressively relegated to the background in the development of this branch of law in Nigeria. And yet some institutions of customary law, particularly in the field of family law, are imbued with characteristics of a permanent nature. To contemplate any supercesion of them in the foreseable future will be a fruitless and unworthy task.[65] We have had occasions to point out that the growth of rules of private international law is the necessary result of modern technological development which is shrinking space in time and business

63. But see, Karibi-Whyte, 1 Nigeria Lawyers Quarterly 9, at p.18
64. Dicey: Conflict of Laws (3rd ed.) pp.30 and 781.
65. cf. Ajayi: "The Interaction of English Law with Customary Law in Western Nigeria" 4 J.A.L. (1960) 48.

and diverse legal institutions far closer together. Can it be urged that only persons subject to the English type law in Nigeria have intercourse with other countries or other law districts? If not, should the Nigerian private international law, then, reflect only English law attitudes and disregard customary law when other foreign systems, even where institutions analogous to those of our customary law are unknown, are showing increasing readiness to accord recognition to such "unfamiliar" legal institutions.[66] Or should we in Nigeria adopt an unprecedented and unique experiment of having two systems of private international law - one for the common law and the other for customary law. It is submitted that for the purpose of this subject, the actual dualism of the Nigerian legal system should be considered immaterial. Being an all pervading subject, one of the facts which Nigerian private international law must deal with and put into effect is that customary law is part of the Nigerian law. Its rules should be part of the substantive sources - the energising forces - which are constantly remaking the body of Nigerian private international law.

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66. Apart from the recent liberal attitude of the English law towards polygamous marriages noted above, a polygamous marriage, if valid according to the personal laws of the parties at the time it was celebrated, is recognised in France so as to entitle each of the wives to assert in the country her full marital rights. See the decision of Civ. Jan. 1958, D.1958, 265, cited by Von Landauer in 13, I.C.L.Q. p.22.

    The American law makes a distinction between actually polygamous marriages and potentially polygamous but actually monogamous marriages. The former enjoys limited recognition while the latter is equated with monogamous "christian" marriages for all purposes (See Bartholomew: "Recognition of Polygamous Marriages in America" 13, I.C.L.Q.1022 at pp.1073-5) The American attitude appears to be that a marriage is not polygamous unless there is de facto plurality of wives. See Royal v. Cudhay Packing Co. (1922) 195 Ia. 759; 190 N.W.427.

CHAPTER TWO

DOMICILE

A. INTRODUCTION

It has already been observed that the English common law concept of domicile has a statutory foundation in Nigeria by virtue of the reception clauses which provide that the common law of England as at a certain date shall be operative in the country.[1] The formative period in the evolution of principles as regards the concept of domicile in England occurred well before the Nigerian reception of the common law.[2] There seems to be no significant difference between the concept in the Nigerian law and that of the English law from which it originates. This is especially so in view of the fact that jurisdiction of the Nigerian High Courts in divorce and other matrimonial causes - all situations in which domicile predominates - is exercised in conformity with the law and practice for the time being in force in England.[3] And, moreover, as a result of the unitary concept of domicile, i.e. that it bears exactly the same meaning in matrimonial causes as well as in other matters of personal law, (the effect of which is that judges cite indiscriminately cases dealing with domicile for purposes other than the one

1. See Chapter 1.

2. As instanced by the leading cases of e.g. Whicker v. Hume (1858) 7 H.L.Cas. 124; Lord v. Colvin (1859), 4 Drew.366; Moorhouse v. Lord (1863), 10 H.L.C. 272; Bell v. Kennedy (1868), L.R.1 Sc. & D. 307 and Udny v. Udny (1869), L.R.1 Sc. & D. 441. See also Graveson "Law of Domicile in the Twentieth Century" in Marshall: The Jubilee Lectures (1960), p.85, where he observed that by 1900, the date of reception of English common law in Nigeria, the subject of domicile had achieved an apparent completeness in matters of law.

3. See the postscript for the present position of the law.

immediately on hand) any opinion expressed by the judges as regards the law of domicile in matrimonial causes are bound to be reflected in other branches of the law. It is therefore unnecessary in a study of this nature to embark on a detailed re-statement of the Nigerian rules for the acquisition, loss and change of a person's domicile, except in so far as they are necessary for a consideration of the reform of the concept in the Nigerian law. A survey will show more than anything that they are, at present, the same as the English principles.[4]

Three problems are involved in the consideration of the law of domicile. The first is to ascertain the area of domicile i.e. to locate the territorial unit where a person has his domicile. Is domicile to be fixed for all purposes in Nigeria as a whole; Is it in Nigeria for certain purposes and in a state for others or, in the state for all purposes? This will involve an examination of the legislative division of powers on matters which depend on domicile between the National and state governments.

The second is to determine what legal consequences result from the location of a person's domicile.

The third problem is to consider reform of the concept of domicile in view of the handful of hard cases the general pattern of which seems to have established that the strict application of the traditional concept of domicile in Nigeria is fraught with a substantial amount of injustice. This appears to have arisen not only because of the widespread dissatisfaction with certain principles of domicile in the common law world but more importantly as a result of the federal nature of government

4. Except that in England, as a result of s.1 of the Family Law Reform Act 1969, a person of the age of 18 years attains full age and can therefore acquire a domicile of choice as from 1st January, 1970; whereas in Nigeria a person has no capacity to acquire an independent domicile until he attains the age of 21 years.

in Nigeria and the existence of a dual system of law i.e. the territorial common law and the customary law, in each of the twelve states of the Federation. The result of this diversity of laws is that certain concepts and observances under customary law cannot but have some impact on the law of domicile in Nigeria just as the rules of common law have had tremendous influence on customary law.

The first problem indicated above will be dealt with in the first part of this chapter while a consideration of the third problem will be made in the second part. But briefly to dispose of the second problem, it is generally agreed in the common law systems of law that the essential purpose of the law of domicile is to determine the personal law of a person. The position in Nigeria is, as a general rule, not different since, as we have already observed, Nigerian private international law has a historical basis in the English law. The only exception is that in England, liability for income tax depends, in certain cases, on a person's domicile in the United Kingdom;[5] whereas in Nigeria, residence within a State, and not domicile, is the basis of liability for all types of income tax.[6] But like in England, liability for estate duty in Nigeria would seem to be closely linked with succession and is accordingly governed by the law of domicile.

Therefore, the scope of the personal law in Nigeria does not extend beyond settling questions affecting matters of domestic status, i.e. matters of family relations and "family property".[7] Thus, under the Nigerian as well as English private

5. See Graveson, op.cit., 6th ed., p.98 et seq.

6. Income Tax Management Act, No.21 of 1961, s.3 (2) and the First Schedule, s.1.

7. "Family Property" as here used should be construed as the rights of spouses in each other's property as a result of marriage. It should therefore be distinguished from family property in the sense of a common property of members of an extended family under Customary Law.

international law, the law of domicile regulates the following matters of personal law: The essential validity of a marriage including capacity of each party to enter into it. The mutual marital rights of the spouses and the effect of marriage on the proprietary rights of the spouses. Traditionally, it is the law that determines the judicial jurisdiction in divorce and, to a limited extent, also the court's jurisdiction in other matrimonial causes. As a general rule, it constitutes the basis on which a foreign divorce decree is recognised. It governs legitimacy and legitimation and determines the validity of wills of movable property and the division of such property in the event of intestacy.[8] But since the application of law in each of the Nigerian States is partly territorial and partly personal, these matters of personal status are not necessarily determined by a single system of law applicable to all persons resident within the limits of a territory as in England, New York or Ontario. In most cases, matters of personal law of a Nigerian person are governed by a system of Customary law which is determined by his membership of an ethnic community or his adoption of the "mode of life" of another community. This customary law may be designated as Moslem law, if it has a religious connotation as in some of the Northern Nigerian states. Domicile in the Nigerian law, therefore, appears to perform an additional function through which a foreign court can make a further internal reference to the system of customary or Moslem law governing an individual's personal rights.

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8. For the scope of personal law under English Conflict of Laws, See Cheshire, op.cit., 7th ed., p. 143, and also, Seventh Report of the Private International Law Committee, Cmnd. 1955 of 1963, p.8.

B. AREA OF DOMICILE IN NIGERIA.

It is a basic principle of common law that domicile signifies a personal connection with a territory subject to one system of law. In this respect, a distinction is invariably made between (a) the whole of a Federation which is co-extensive with a national boundary and subject to one sovereign, for example, the United States of America, Canada, Australia, Switzerland or Nigeria and (b) a territorial unit subject to one system of law but forming a component part of the whole of the territory subject to one sovereign, for example, New South Wales or Western State of Nigeria. In Dicey's terminology, the former is a "State" whilst the latter is defined as a "Country".[9] For the purpose of the ensuing discussion about the Nigerian law of domicile, however, "country" is used to describe the former while the word "Region" or "State" is employed to refer to the latter situation so as to make the use of the term herein comformable with the political and constitutional sense of the word in Nigeria.

The traditional common law view as regards domicile in a federation, or other political affiliations like the United Kingdom, is that a person can only be domiciled within a state or province of a federation and not in the country constituting the political affiliation generally. The location of domicile must be in a territorial unit under a single system of law. Thus a person would be domiciled in England or Scotland but not in the United Kingdom; in California state or New York state and not in the United States. Similarly, the domicile of an individual would be fixed in Western Australia, Alberta or Lagos but not in Australia, Canada or Nigeria.[10] The policy consideration

9. Dicey & Morris: Conflict of Laws (8th ed.) pp.12-13.

10. See e.g. Attorney-General for Alberta v. Cook [1926], A.C.444; Gatty and Gatty v. A.G. [1951], P.444; Travers v. Holley [1953], P.246; and the Restatement Second, Proposed Official Draft, Part I. 1967: Para.11, Comment g, as regards the position in the United States of America.

underlying this view rightly maintains that if domicile is fixed in a larger unit than that having a single system of law, the concept of domicile will fail in its essential purpose of establishing the personal rights of the individual in accordance with the system of law most close to him. For instance, it is a common law principle of private international law that succession to movables is governed by the law of the place where the deceased was domiciled at the date of his death. If his domicile is fixed in Nigeria, the problem is still unresolved as the solution provided by the different laws of the states of the federation differ considerably. The correct solution would be for the domicile of the propositus to be fixed in a state subject to one territorial system of law, for example, the Western state or Lagos state.

Nevertheless, the establishment of a federal structure of government in some of the countries within the common law world, necessitating a division of legislative competence on matters which are regulated by domicile between the federal and state legislatures, has given rise to a reappraisal of this unitary concept of domicile in the common law world.[11] The view among legal writers is, also, moving progressively towards the possibility of establishing a national domicile in a federation, at least, for certain matters on which the Federal Parliament has legislative competence to create uniform law in the whole of the federation.[12] In this sense, the whole of the federation would in fact become a country operating a single "system" of law in those matters with respect to which there is a uniform law, even though in other areas of personal status, domicile may still be located in a legal component of the federation.

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11. See below.

12. Graveson: "Reform of the Law of Domicile" in 70 L.Q.R.492, also the same author in Marshall: The Jubilee Lectures (1960) p.85 et seq., and The Conflict of Laws, 6th ed. p.188; Cowen and Mendes da Costa: 78 L.Q.R.62; Morris: 11 I.C.L.Q.641; Dicey and Morris: The Conflict of Laws, 8th ed., p.82; Cheshire: Private International Law, 7th ed. p.150; and Walter Pollak: 50 S.A.L.J. 449 at pp. 455-457.

The area of domicile in Nigeria poses a pressing problem in the country's private international law. Different judicial views have been expressed. The uncertainty created by these divergent views has, at times, necessitated the employment of the "rule of alternatives" whereby a judge will base his decision on two alternative views in the hope that whichever view ultimately proves triumphant, the decision in the case will still stand.[13] The Chief Justice of the High Court of Lagos, in the case of Ogunmuyiwa v. Ogunmuyiwa, [14] was so exasperated with these conflicting views that he actively encouraged a Counsel or party to a case to take the point on appeal to the Supreme Court for final determination. He said:

> "This point has been raised in Matrimonial Causes on so many occasions and I am made to understand that there are more than two conflicting decisions as to whether there is one Nigerian domicil or [twelve] separate [state] domicils. These decisions have been in the High Court and I am not aware of Counsel or parties taking the final step to put the matter at rest once and for all by proceeding on appeal to the Supreme Court. I express my own view when I say that the sooner this red herring of delay and confusion is allowed to return to its normal habitat the better."

Three solutions have been proposed. None of them has been confirmed, as far as we are aware, by the highest tribunal in Nigeria.

It will be pertinent to preface a discussion on this point with a consideration of the allocation of legislative competence between the Federal and State Governments. Nigeria was a unitary country until 1954. Prior to that date domicile needed be fixed in Nigeria as a whole.[15] But with the establishment of five law

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13. See e.g. Udom v. Udom (1962) L.L.R. 112; Odiase v. Odiase [1965] N.M.L.R. 196.

14. Unreported, Lagos High Court, Suit No. WD/49/65 of 23/3/66.

15. Shyngle v. Shyngle (1923) 4 N.L.R.92; Jones v. Jones (1965) 14 N.L.R.12; In Smith v. Smith (1924) 5 N.L.R.102, Van Der Meulen, J., however erroneously stated that the parties to the suit were "domiciled in Lagos".

districts, which in 1967 were increased to twelve, certain matters of personal status are specifically allocated to the sphere of federal law while the rest remains matters of state law. The following aspects of matters of personal law are, under the constitution, within the exclusive legislative competence of the federal legislature:

> "Marriages other than marriages under Moslem law or other customary law; annulment and dissolution of, and other matrimonial causes relating to, marriages other than marriages under Moslem law or other customary law",

i.e. monogamous marriages and matrimonial causes relating to such marriages.[16] The Constitution further provides that the Federal legislature has exclusive competence on

> "any matter that is incidental or supplementary:-
>
> (a) to any matter mentioned elsewhere in the list; or
>
> (b) to the discharge by the Government of the Federation or any officer, court, or authority of the Federation of any function conferred by this Constitution".[17]

The Federal Acts implementing these constitutional provisions are, the Marriage Act [18] and the State Courts (Federal Jurisdiction) Act, 1958.[19] The Marriage Act operates throughout the Federation while the State Courts (Federal Jurisdiction) Act excludes the Lagos state from its operation. This state, however, has a similar Act, the High Court of Lagos Act, [20] also passed by the Federal Parliament. The purpose of the State Courts (Federal Jurisdiction), Act and the High Court of Lagos Act are two-fold. They confer jurisdiction in matrimonial causes on the High Court of a

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16. The Federal Republican Constitution of Nigeria, 1963, Schedule Part I, Item 23. As "Marriage" within the context of the above constitutional provision refers only to monogamous marriages, any reference to marriage, divorce or matrimonial cause in the rest of this Chapter should be construed, unless otherwise stated, as reference to a monogamous marriage.
17. The Federal Republican Constitution of Nigeria, 1963, Schedule Part I, Item 45.
18. Cap.115, Laws of the Federation of Nigeria, (1958 ed.).
19. S.4.
20. S.16.

state and provide for the law that should be applied in granting reliefs in divorce and other matrimonial causes. But instead of the Federal Parliament enacting its own law on matrimonial causes, it simply provides, by these two Acts, that each of the states should apply the current Matrimonial Causes Act in force in England,[21] It is, therefore, obvious that the present controversy as to the area of domicile in Nigeria arises as a consequence of the constitutional division of legislative and judicial powers whereby matters in which domicile is relevant are shared between the federal and state governments.

1. A COMMON NIGERIAN DOMICILE FOR ALL PURPOSES.

The first view, presumably based on a broad interpretation of the above constitutional provisions and the meaning of marriage as an institution on which almost all matters concerning family relations are inseparably attached, was expressed by Adefarasin, J., in a Lagos case of Odunjo v. Odunjo [22] where he maintained that the area of domicile remains exactly the same as the pre-federation period on the footing that legitimacy and succession are incidental to marriage under the Marriage Act and that the law practiced in all the Nigerian States as to these is the same. In his view, the infalible test applicable is

> "to look more closely to the marriage laws of a country with a Federal system of government as we have in the Federal Republic of Nigeria to determine whether or not there is one common Nigerian domicil. It seems to me that if one system of marriage laws obtains in all the component parts of the country, there will be one domicil as in the case in England and Wales. If, however, there are different marriage laws obtaining in the Regions, then there will be as many domiciles as there are regions". 23

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21. This statement is no longer true as from 17th March 1970. See the Postscript.

22. (1964) L.L.R.43.

23. Ibid., at pp. 45-46.

Thus applying this remarkable criterion for determining the area of domicile in a federation, the learned judge found that the effect of the constitutional allocation of legislative competence on monogamous marriage and matrimonial causes relating to it (as opposed to the formation, annulment and dissolution of polygamous marriages) to the Federal Government is as follows: First, the competence of the Federal Government to enact laws on the formation, annulment, dissolution, etc. of monogamous marriages implies power on the part of that Government also to enact laws on succession, legitimacy and such other matters of status. Secondly, the exercise of the constitutional power by the enactment of a Marriage Act which deals mainly with the celebration of monogamous marriage and the capacity of a person to enter into it, and applies throughout the federation, means that there is now "a unity of law in Nigeria in respect of matters which depend on domicile, i.e., Marriage under the Act, Divorce under it, Succession, Status, Legitimacy, etc".[24] Therefore, he held that "there is one Nigerian Domicile" in relation to these matters.

Confronted with Lord Westbury's test in Bell v. Kennedy,[25] which was applied by the Privy Council in A.G. for Alberta v. Cook[26] to establish the principle that the domicile of a person can only be located in a Canadian Province as opposed to the federation as a whole, Adefarasin, J., remarked that the decision in Cook's case was founded on the ground that there was no uniformity of marriage laws in the Canadian Provinces. On this hypothesis, perhaps the learned judge will want us to believe that as a result of the Australian Marriage Act of 1961, which provides for a uniform marriage law throughout the Australian

24. (1964) L.L.R. 47.
25. (1868) L.R. 1 Sc. & D. 307.
26. [1926] A.C.444.

Federation, there is now a common Australian domicile in respect of all maters depending on domicile!

Be that as it may, the judgment of Adefarasin J., deliberately left out so many factors which affect the location of domicile in a federation in his search for unity of law. The word "deliberate" is used since it is inconceivable that a High Court judge in Nigeria will fail to realise that there is dualism of laws in the federation of Nigeria and that whatever the position under the general law (i.e. under statute and at common law), there is no uniformity in the law of succession under the system of customary law, nor in the law of legitimacy under that system.

But even as regards legitimacy and succession under the general law, Hurley Ag. C.J., in the Northern Nigerian case of Okonkwo v. Eze, [27] had earlier on expressed the view that these two matters are not incidental to marriage so as to justify them being regarded as falling under the law-making powers of the Federal Government. He said:

> "Neither legitimacy nor succession are subject within the exclusive legislative competence of the Federal Legislature. In regard to them the Regions may legislate independently of the Federation and of one another, and they may legislate variously. Each Region, in relation to these matters, is a territory subject to a separate system of law".

Postponing for the moment a detailed discussion on the absurdity of holding that legitimacy and legitimation are incidental or supplemental to marriage [28] and therefore within the exclusive legislative competence of the Federal Parliament, it is surprising how Adefarasin J., arrived at his conclusion that succession is incidental to marriage. As previously stated, it must be assumed that the learned judge had in mind succession under the general law

27. 1960) N.N.L.R. 80, at p.81.

28. See Chapter Six, p. 498 et seq.

as it is beyond dispute that succession under customary law is as varied as the diversity of the system of customary law within the country.[29] What is equally disturbing is the learned justice's assertion that the Marriage Act "provides for succession on intestacy in section 36" without going further to explain that sub-section 3 of section 36 provides in clear terms that the section applies to "the colony only", i.e. now a part of the Lagos State.

Attention may be drawn in this respect to the Probates (Re-Sealing) Decree, 1966,[30] the effect of which is that the Federal Parliament recognises the legislative competence of the states in matters of succession, their separate jurisdiction in the grant of probate and letters of administration and consequently the possibility of diversity of laws on succession even under the general law in the federation. Section 2 of the Decree, which replaces a former Act, provides for the re-sealing of probates or letters of administration granted by the High Court of one Nigerian state in respect of the estate of a deceased person in the other sister-states. Then section 3 of the Decree went on to provide that before re-sealing, the High Court of the state where application for re-sealing is made may require evidence of the "domicile of the deceased person".[31] It is submitted that if, as stated by Aderarasin, J., there is uniformity of law of succession throughout the federation and consequently one unified jurisdiction for probate, there would have been no necessity for a federal enactment providing for the re-sealing of probates granted in one state in the others, much more an inquiry as to the place of domicile of the deceased person within the federation.

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29. See e.g. Kasunmu and Salacuse, Nigerian Family Law, p.291.
30. No.13 of 1966, replacing a previous Act, Cap.161, Laws of the Federation of Nigeria, 1958 ed.
31. Emphasis supplied.

It is significant in this respect to observe that the Federal Government has made no attempt, since the inception of a federal structure of government in Nigeria in 1954, to enact a law on succession applicable to the whole of the federation. Hence it requires no penetrating power of analysis to discover that the Administration of Estates Law [32] and the Wills Law [33] of the Western State of Nigeria, both of which subsequently become operative in the Mid-Western State,[34] are substantially different from the succession laws of the other Nigerian states. For while the Laws of the Western and the Mid-Western States are adaptations of the current English statutes to suit local conditions, the other states still operate the three-century old English Statutes of Distribution, 1670 and 1685. To speak, therefore, of uniformity of law of succession in Nigeria and that it is governed by "one Nigerian domicile" is to fly in the face of realities.

It is also difficult to understand the basis for the assertion of Adefarasin, J., that all matters of status are within the exclusive power of the federal Parliament. The celebration of monogamous marriage and the capacity of parties to enter into it, with which the Marriage Act is primarily concerned, create only a limited number of domestic status which are determined by the law of domicile, i.e., that of husband and wife.[35] The Act, in addition determines the majority of a child for the purpose of celebrating a monogamous marriage under it.[36] It has also been shown that the status of being a testate or an intestate

32. Cap. 1, Laws of Western Nigeria, 1959 ed.

33. Cap. 133, Laws of Western Nigeria, 1959 ed.

34. By virtue of the Mid-Western State (Territorial Provisions) Act, No.19 of 1963, s.2.

35. See Graveson: Status in the Common Law, (1963) p.138.

36. Marriage Act, s.18.

is outside the legislative competence of the federal parliament. Are we then to understand that a monogamous marriage is a necessary or essential ingredient in the process of legitimacy or legitimation in Nigeria? Are other categories of domestic status like that of the adopter or adoptee inclusive in the legislative competence of the federal Parliament? The statement that "Marriage lays the legal foundation for the family, but the family can exist without marriage" is a sufficient recognition of the factual situation of life to justify a negative reply to the above inquiries. In Nigeria, it has the force of law.[37] It is submitted that the view of Adefarasin, J., completely disregards the devolution of legislative powers that was brought about by recent constitutional changes and is, therefore, untenable. It ought not to have been considered were it not for the fact that it was voiced by a High Court judge. The Marriage Act is not a necessary peg upon which all categories of domestic status must be hung.

2. NATIONAL DOMICILE FOR MATRIMONIAL CAUSES AND STATE DOMICILE FOR OTHER PURPOSES.

A second solution proposed by the Nigerian case law favours the location of a common Nigerian domicile for matters on which the Federal Parliament had exercised its constitutional powers and enacted laws of universal application throughout the federation, i.e. on monogamous marriage, divorce and other matrimonial causes, relating to such marriage. Thus, for example, in Udom v. Udom,[38] a case decided by the Lagos High Court and which

37. In Lawal v. Younan [1961] All N.L.R. 245, the Federal Supreme Court, in a comprehensive statement about the law of legitimacy in Nigeria held that children not the issue of a monogamous marriage or a customary law marriage are regarded under Nigerian law as legitimate if paternity has been acknowledged by the putative father.

38. (1962) L.L.R. 112 at p.119.

concerned the dissolution of a monogamous marriage, Coker, J., having assumed jurisdiction on the basis of the parties' domicile in Lagos, observed, obiter, that

> "Under the constitution of Nigeria "Marriage and Divorce" is a matter within the exclusive competence of the Federal Legislature ..... and it is inconceivable that on this subject different laws will exist in the different regions. No particular advantage is derivable by claiming domicile in any particular Region except perhaps that of convenience. .... but I wish to say that it will be a matter for regret if it could be urged by any Nigerian at any time that the fact of residence within a particular region does entitle him to confine his domicile to that place alone as opposed to a common Nigerian domicile".

Four years earlier, Onyeama, J., had decided in the undefended divorce case of Nwokedi v. Nwokedi [39] that there is only one domicile in Nigeria for purpose of jurisdiction in matrimonial causes on the ground that there is only one uniform law relating to this subject throughout the Federation and that the jurisdiction of the regional High Courts, though separately exercised, derives from the same source. But before the decision in Udom's case, Onyeama, J., had changed his view and insisted on regional (now state) domicile.[40] Indeed, conversion from the view-point of a "two dimensional concept of domicile" to that of a state domicile for all purposes is not merely an aberration of Onyeama, J. Such change of view has taken place in decisions by the Chief Justice of the Lagos state,[41] and other judges in the state.[42]

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39. (1958) L.L.R.94.

40. See below

41. In Effiong v. Effiong, Unreported, Lagos High Court Suit No. WD/6/67 of 13/10/67; Akemu v. Akemu, Unreported, Lagos High Court Suit No. WD/51/66 of 6/11/67; and Enwezor v. Enwezor, Unreported, Lagos High Court Suit No. WD/51/67 of 18/3/68; it was held by Taylor, C.J., that a common Nigerian domicile is sufficient to found the court's jurisdiction in matrimonial causes, whereas in Omo-Osagie v. Omo-Osagie, Unreported, Lagos High Court Suit No. HD/12/68 of 8/7/68, the same Chief Justice assumed jurisdiction inthe divorce proceedings on basis of the parties domicile in Lagos.

42. Despite the strong, but admittedly wrong, view of Adefarasin, J., that domicile for all purposes should be fixed in Nigeria (see

/Fnote cont.....

The net result is that only a few decisions[43] of the Lagos High Court support the view that domicile should be related to purpose links and consequently, that a common Nigerian domicile exists as basis of the court's jurisdiction in matrimonial causes, even though for other purposes a state domicile should be fixed.

The two-dimensional approach is also favoured in the Western and the Mid-Western states by individual judges. For instance, Fatayi-Williams J., in the Western Nigerian case of Odiase v. Odiase [44] stated his view on the matter in the following terms:-

> "there is one law with respect to matrimonial causes arising out of a monogamous marriage throughout Nigeria, in the same manner as the Marriage Act .... operates throughout the country. This, as has been pointed out, follows from the distribution of legislative power by the Constitution and from the exercise of that constitutional power. To my mind, the framework within which this unity of law and jurisdiction is established contemplates Nigeria, for that particular purpose, as a single law district within which a domicile by reference to the common law concepts of animus and factum may be established. It is, in my view, possible in a Federation like Nigeria for a person to acquire a Nigerian domicile for the purpose of [establishing the jurisdiction of the courts in matrimonial causes] even though for other purposes his domicile or residence may be connected with a [state]".

F/note 42. cont. from previous page.

above), he assumed jurisdiction in divorce proceedings in Vigo v. Vigo, Unreported, Lagos High Court Suit No. WD/46/1966 of 10/2/67; and Obi v. Obi, Unreported, Lagos High Court Suit No. HD/38/66 of 23/3/1967 on the basis that the "parties are domiciled in Lagos". See also, Omololu J.'s decisions in Eneli v. Eneli, Unreported, Lagos High Court, Suit No. HD/52/65 of 27/6/66 and Ekprikpo v. Ekprikpo, Lagos High Court, Suit No. WD/59/65 of 14/11/66.

43. Besides the cases cited in F/note 42 above, see Ofodile v. Ofodile, Unreported, Lagos High Court Suit No. WD/6/1965 of 7/3/66, per Adedipe J.; Ishioye v. Ishioye, Unreported, Lagos High Court Suit No. WD/22/65 of 16/5/66, per Adedipe J.; and Omagbemi v. Omagbemi, Unreported, Lagos High Court Suit No. WD/36/66 of 28/4/67 per Kazeem, Ag. J.

44. (1965) N.M.L.R. 196 at p.198.

And to complete the picture, a similar view was expressed by Irikefe J., in the Mid-Western Nigerian case of Akhigbe v. Akhigbe [45] where he held that both "the petitioner and the respondent are domiciled in Nigeria and resident in the Mid-Western State thereof when the petition was filed". Consequently, he assumed jurisdiction to dissolve their monogamous marriage.

3. STATE DOMICILE FOR ALL PURPOSES.

By far the view commanding the greatest support of judicial opinion in Nigeria is the traditional one that domicile for all purposes should be fixed within a legal sub-division of the country i.e within a state. It will not be necessary to discuss more than two of these cases [46] by way of illustration. The first case to adopt this traditional approach since the division of the country into separate legal components is Okonkwo v. Eze.[47]

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45. Unreported, High Court of Mid-Western Nigeria, Suit No. U/1/67 of 26/6/67.

46. Okonkwo v. Eze (1960) N.N.L.R.80; Machi v. Machi (1960) L.L.R. 103; Olugele v. Olugele (1961) E.N.L.R.35; Uzo v. Uzo, Unreported, High Court of Eastern Nigeria, No. E/4D.63; Adeoye v. Adeoye (1962) N.N.L.R.63; Adeyemi v. Adeyemi (1962) L.L.R.70; James v. James, Unreported, High Court of Mid-Western Nigeria. Suit No. W/32/63 of 25/4/64; Uchendu v. Uchendu (1962) L.L.R. 101; Arinze v. Arinze [1966] N.M.L.R.155; James v. James Unreported, Western Nigeria High Court Suit No. I/24/66 of 17/6/66; Eneli v. Eneli, Unreported, Lagos High Court Suit No. HD/52/65 of 27/6/66; Apara v. Apara, Unreported, Lagos High Court Suit No. WD/7/66 of 7/1/67; Ibe v. Ibe, Unreported, High Court of Eastern Nigeria, Suit No. O/4D/65 of 10/2/67; Obi v. Obi, Unreported, Lagos High Court, Suit No. HD/38/66 of 23/3/67; Sode v. Sode, Unreported, Lagos High Court, Suit No. HD/35/66 of 6/6/67; Onanuga v. Onanuga, Unreported, Lagos High Court, Suit No. WD/43/66 of 15/7/67; Johnson v. Johnson, Unreported, Lagos High Court, Suit No. WD/31/66 of 28/8/67; Fafore v. Fafore, Unreported, Lagos High Court, Suit No. WD/25/67 of 22/12/67; Adeleke v. Adeleke, Unreported, Lagos High Court Suit No. HD/32/66 of 4/5/68; Gbaja-Biamila v. Gbaja-Biamila, Unreported, Lagos High Court, Suit No. WD/20/67 of 10/5/68; Omo-Osagie v. Omo-Osagie, Unreported, Lagos High Court, Suit No. HD/12/68 of 8/7/68.

47. (1960) N.N.L.R.80

In that case, a wife brought a divorce petition against her husband on ground of adultery. The petition alleged that the parties were domiciled in Nigeria. Hurley, Ag. C.J.,(as he then was) declined jurisdiction on the footing that the jurisdiction of the High Court of Northern Nigeria in divorce is confined to situations where the parties are domiciled in Northern Nigeria. In dismissing the argument of the counsel for the petitioner that as a result of the unity of law on this subject throughout the federation, Nigeria should be regarded as a territory subject to one system of law in matrimonial causes and therefore considered as a unit for the location of domicile as a basis of the court's jurisdiction in divorce, the learned Chief Justice said:

> "But a person cannot have more than one domicile at the same time: Dicey, Conflict of Laws, rule 3. Now domicile gives exclusive jurisdiction to the courts of the country of the domicile in other causes, for example, in causes raising questions of legitimacy. It gives jurisdiction to the courts of the domicile also, though not exclusive jurisdiction, to determine the succession to movables: Dicey, rule 75. And it governs the succession to movables in whatever court the succession may fall to be determined: Dicey, rule 178. Neither legitimacy nor succession are subject within the exclusive legislative competence of the Federal Legislature. In regard to them the Regions may legislate independently of the Federation and of one another, and they may legislate variously. Each Region, in relation to these matters, is a territory subject to a separate system of law. Each Region is a unit, to the exclusion of the other Regions and the Federation, for the purposes of domicile where domicile comes in question in relation to legitimacy, or in relation to the succession to movables. The person whose domicile is material in any dispute concerning legitimacy or concerning the succession to movables will necessarily have a domicile in one of the Regions or in the Federal Territory of Lagos, not in Nigeria as a whole. When he comes to court to petition for a dissolution of marriage, he cannot have a different domicile, for he cannot have more than one domicile at the same time; he must have the same domicile as he has for all other purposes, and that will be a Regional

domicile or a domicile in the Federal Territory."[48]

According to this view, there is no distinction between domicile as basis of jurisdiction in matrimonial causes and domicile as the test for determining the personal law of a person. No apology is required for quoting at such length Hurley, C.J.'s view as it represents, in our opinion, a concise statement of the operation of the law of domicile in Nigeria not only in the light of English precedents, but by virtue of the Nigerian Statutes dealing with domicile for purposes of jurisdiction in matrimonial causes.[49]

About seven months after the decision in Okonkwo's case, the same problem arose for determination in the case of Machi v. Machi,[50] brought before the Lagos High Court. De Lestang, C.J., was also concerned with the question whether he should assume divorce jurisdiction in respect of a wife's petition alleging that she and the husband were domiciled in Nigeria. The parties were Ibos who had been resident in Lagos for over 16 years. The Chief Justice examined the line of cases dealing with area of domicile in a federation. He found that it was a universal principle that domicile cannot be fixed, for example, in the United States, Canada or Australia generally, but in one of the constituent states or provinces as the case may be. He argued that Nigeria is a Federation composed of several independent and sovereign territories, each with its own system of law and accordingly decided that a person may only acquire domicile in a territory subject to one system of law i.e. a state, but not in Nigeria generally. He also held that since each of the former Regions has a separate jurisdiction

48. 1960 W.N.N.L.R. 81-82.
49. See below
50. (1960) L.L.R. 103.

from the point of view of Nigerian private international law, a person alleging the acquisition of a domicile of choice in a particular law district "must prove an actual residence in such place with a fixed settled determination of making his permanent residence therein". Proof of animus manendi in the federation of Nigeria generally without a reference to any particular state is insufficient.

As to the suggestion that since divorce law is uniform throughout Nigeria and that the test of a territory subject to one system of law be adopted for matrimonial causes jurisdiction, the Chief Justice replied "that the fallacy of such argument lies in the fact that the identity of law on one particular subject is not conclusive of one system". According to him, there must be, in addition, an identity of courts as a foundation for a unitary domicile in the Federation.

Views similar to the reasoning in Okonkwo's and Machi's cases have been expressed in later decisions of the state High Courts.[51] Thus, for example, Onyeama, J., having rejected the dogma of one domiciliary law for all purposes and adopted a two-dimensional concept of domicile in Nwokedi v. Nwokedi [52] by holding that "there is only one domicile in this country for matrimonial causes and that is the Nigerian domicile", later relented in three subsequent decisions [53] and maintained an emphatic view on regional domicile for purposes of jurisdiction in matrimonial causes as well as for other matters.[54] He seems to have been overawed by the reasoning of Hurley, C.J., in Okonkwo's case. Hence in Uchendu v. Uchendu,[55] he observed that the "view

51. See note 46 supra.

52. (1958) L.L.R.94.

53. Adeyemi v. Adeyemi (1962) L.L.R.70; Uchendu v. Uchendu (1962) L.L.R.101; Ero v. Ero, Unreported, cited from Kasunmu and Salacuse, op.cit., p.115.

54. See, especially, Adeyemi v. Adeyemi (1962) L.L.R. 70 at p.71.

55. (1962) L.L.R.101.

appears to prevail that domicile for purposes of matrimonial causes in this country must be proved to be in the region in which the High Court called upon to grant relief has jurisdiction" and cited Okonkwo's case in support.

The High Courts of the three Eastern Nigerian states had had no opportunity of making their views felt on the possibility of having a two-dimensional concept of domicile within the federation. This is, presumably, because they are territories more of emigration rather than of immigration. Even before the last civil war (6th July, 1967 to January 15, 1970) had a chequered effect on their legal development, the question of domicile as a criterion for jurisdiction in matrimonial causes arose only in cases where the parties are indigenes of Eastern Nigeria. It is not surprising, therefore, to observe from the few reported cases emanating from those legal units, that the High Courts assumed jurisdiction in matrimonial causes on the basis of the parties domicile in the forum. [56]

In a nutshell, the existing views as to the area of domicile in the federation of Nigeria are (1) that, on the basis that there exists a uniform law on all matters in which domicile is relevant throughout the federation, there is one common Nigerian domicile for all purposes. (2) That a two-dimensional concept of domicile i.e. a common Nigerian domicile for purpose of jurisdiction in matrimonial causes and a state domicile for all other purposes, had been brought about by the Federal Acts creating uniform law on marriage and divorce. (3) That the historic common law doctrine of a single domiciliary status precludes the operation of a two-dimensional concept of domicile in Nigeria. Despite the uniformity of law on monogamous

56. See e.g. Olugele v. Olugele (1961), V E.N.L.R. 35 p. 36, Uzo v. Uzo (Unreported) High Court of Eastern Nigeria decision No. E/4D/63.

marriages and matrimonial causes relating to them, the domicile of a person for all purposes should still be fixed in a state of the Nigerian Federation.

The first view has been dealt with above and shown to have been based on a misinterpretation of the Marriage Act whose provision in relation to succession is only applicable to the Lagos State. Moreover, it failed to appreciate the limits of the federal government in matters of personal status and family relations. On these bases, it is submitted that the view is faulty and misleading. It will not be pursued further.

The line of reasoning supporting the second view i.e. Uniformity of Federal laws on marriage and divorce as giving rise to a common Nigerian domicile as basis of jurisdiction in matrimonial causes as opposed to state domicile for other matters of personal law, is not without precedent in the common law world. For example, in Australia, the Matrimonial Causes Act, 1959[57] which came into effect on February, 1, 1961 made a radical alteration to the unitary concept of domicile within the Australian Federation. The Act, having unified the grounds for granting decrees in divorce and other matrimonial causes throughout the country, stipulates at section 23 (4) and (5) that domicile of a person "in Australia" shall be the basis of the courts jurisdiction in proceedings for dissolution of marriage and, additionally, for nullity of void marriage, or for a decree of judicial separation, restitution of conjugal rights or jactitation of marriage. In this respect, it must be pointed out that Messrs Kasunmu and Salacuse[58] are in error in stating

57. As amended by the Matrimonial Causes Act, 1965.

58. Nigeria Family Law, p.117. Although it must be conceded that these authors might not have been able to read the full text of the Australian Act, yet Cowen and Da Costa's Article "The Unity of Domicile" in 78 L.Q.R. which they cited contained, in extenso, s. 23 of the Act which established an Australian domicile for matrimonial causes.

that the Act "did not expressly provide for an Australian domicile (as opposed to state domicile) in divorce and matrimonial causes". The effect of this Act as interpreted by Barry, J., in the Victorian case of Lloyd v. Lloyd [59] is that a person domiciled in an Australian state according to the common law rules, could institute divorce proceedings in any other state even though he retained his state domicile for other purposes.

This Australian expedient has now been introduced, with slight modification, into the Canadian system of private international law. The Dominion Parliament in 1968 produced a uniform Divorce Act,[60] which came into force throughout the Canadian Provinces on July 2, 1968. Section 5 of the Act provides that any Provincial Court (which is defined as including the courts of the Yukon Territory and the Northwest Territories) has jurisdiction to entertain a petition for divorce and to grant relief in respect thereof if,

> "(a) The petition is presented by a person domiciled in Canada; and
>
> (b) either the petitioner or the respondent has been ordinarily resident in that province for a period of at least one year immediately preceding the presentation of the petition and has actually resided in that province for at least ten months of that period." [61]

Section 6 of the Act provides that for the purpose of establishing the jurisdiction of a court to grant a decree of divorce, the domicile of a married woman shall be determined as if she were unmarried and, if she is a minor, as if she had attained her majority.

The above provision represents a marked departure from the provision in the Draft Bill submitted to the Dominion

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59. [1962] V.R.70; [1961] 2 F.L.R. 349.

60. 16 Eliz. II, Cap.24.

61. See also, in South Africa, Matrimonial Causes Jurisdiction Act, No.22 of 1939; s.1 of which made domicile of a person within the Republic of South Africa the basis of the courts' jurisdiction in matrimonial causes.

Parliament by the Joint Committee of the Senate and House of Commons on Divorce.[62] Section 9 of the Draft Bill, which was ultimately passed in an altered form as section 5 of the Act quoted above, provides as follows:

> "9-- (1) A husband or wife domiciled in Canada may institute proceedings praying for the dissolution or annulment of the marriage, and for ancillary relief, in any province with a court having jurisdiction to provide such relief, if the petitioner or the respondent has resided continuously in that province for a period of at least one year immediately preceding the presentation of the petition.
>
> (2) For the purpose of this section,
>
> (a) a husband has Canadian domicile if he is domiciled, in accordance with the existing rules of private international law, in any province of Canada; and
>
> (b) a wife has Canadian domicile if she would, if unmarried be domiciled, in accordance with the existing rules of private international law, in any province of Canada".

A comparison of the above two provisions reveals that instead of a Provincial domicile ripening into a Canadian domicile, as proposed in the Draft Bill, the now accepted basis for jurisdiction in matrimonial causes in Canada is domicile of either party in Canada as a whole coupled with an attachment with a Canadian province by actual residence there for a period of at least ten months. For example, a husband and wife renouncing their domicile of origin or of choice in emigrating from a foreign country to Canada need not be concerned as to the particular province in Canada in which they intend to settle. Provided they have a present intention to reside in Canada permanently, and so long they establish the required period of residence in a particular province, the courts of the province will have jurisdiction under the Act to dissolve their marriage, even though for other purposes their domicile will be fixed in the foreign country from whence they came.

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62. Report of the Special Joint Committee of the Senate and House of Commons on DIVORCE, Ottawa, Queen's Printer, 1967, p.159.

We have observed that the solution adopted by Australia, Canada and South Africa has the support of juristic opinion in the common law world. They consider the inflexible doctrine of unitary domicil as tending to become a social anachronism, particularly in a federation. A few years before the Australian innovation, Professor Graveson had suggested [63] that domicile, especially in question of divorce jurisdiction, may be located to accord with practical necessities of constitutional division of powers in a Federation. His doubt, consistently maintained,[64] as to the adequacy of the unitary concept of domicile in a federation has recently been re-stated in greater detail as follows:

> "domicile is traditionally based on a single territorial system of law, yet the citizen of a federation is subject to two legal systems, state and federal, in both of which domicile may be relevant. Surely this common situation calls for a new and two-dimensional concept of domicile, so that a citizen may have federal or national domicile as a basis for application of the law of the federation to which he belongs and a state or provincial domicile as a basis for applying the law of that legal unit of the federation in which he habitually lives. What matters of personal law and jurisdiction should be allocated to the respective spheres of federal and state law would be a question of a constitutional and policy nature for each federation to resolve in its own way.

The adoption of this two-dimensional concept of domicil in parts of the common law world has necessitated a fresh consideration of the principles that should determine the applicability of this doctrine in a federation. First, it is beyond doubt that a deliberate creation of uniform laws by a federal legislature on matters within its legislative competence coupled with the employment of the term "domiciled in the Federation" or

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63. 70 L.Q.R. (1954) at pp.499-500.

64. See e.g. "Law of Domicile in the Twentieth Century" in Marshall: The Jubilee Lectures (1960) at p.101; Graveson: The Conflict of Laws (4th ed.) p.75.

words to similar effect, as a criterion for jurisdiction or choice of law, for those matters would result, as in Australia and Canada, in a two-dimensional concept.[65] This is also the view of Walter Pollak, Q.C., who, writing exclusively for South Africa, states [66] that there is a "Union domicile" at least for purposes of some South African Acts in which the term "domiciled in the Union" was used.

Secondly, it has been suggested by Dr. Morris that a National domicile might exist for the purpose of an Act of a common legislature which did not employ the expression "domiciled in the Federation" but which created uniformity of law on a particular subject throughout the federation. But he goes on to explain that the two-dimensional concept of domicile will probably not apply simply as a result of a coincidence of laws of the legal components of a federation even though such coincidence was brought about by separate Acts of a common legislature.[67]

It will now be necessary to examine the provisions of the Nigerian Federal legislation on divorce and other matrimonial causes in the light of the above propositions, and in comparison with the Australian and the Canadian Acts, so as to discover whether or not a two-dimensional concept of domicile, as urged in few decisions of the Nigerian courts, can be justified. The first Federal enactment on this matter, the High Court of Lagos Act, which came into effect on 31st December, 1955 and applies exclusively to the Lagos State, [68] provides that

> "The jurisdiction of the High Court in ..... divorce and matrimonial causes and proceedings may ..... subject to rules of court, be exercised in conformity

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65. Dicey and Morris: The Conflict of Laws (8th ed.) p.83.

66. in 50 S.A.L.J. p.457 et seq.

67. Dicey and Morris, op.cit.

68. As to its applicability to the whole of the newly constituted Lagos State, which now includes part of the former Western Region of Nigeria, See Lagos State (Applicable Law) Edict, No.2 of 1968.

> with the law and practice for the time being in force in England." [69]

The second, the State Courts (Federal Jurisdiction) Act of 1958 became operative on 25th September of the same year.[70] It, too, provides that

> "The Jurisdiction of the High Court of a State [71] in relation to marriages, and the annulment and dissolution of marriages, and in relation to other matrimonial causes, shall, subject to the provision of any laws of a State [71] so far as practice and procedure are concerned, be exercised, by the court [71] in conformity with the law and practice for the time being in force in England." [72]

The effect of these provisions is that, by a process of legislation by reference, the Nigerian Federal Parliament, like those of Australia and Canada, created uniformity of substantive law as regards matrimonial causes throughout the Nigerian states even though it recognised that each of them may have different Rules of Practice pertaining to divorce and other matrimonial causes. It is on this basis that the Nigerian cases discussed above have raised the question, logically perhaps, whether on the analogy of the Australian situation, this uniformity of substantive law does not imply that the Federal Parliament

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69. Lagos High Court Act, s. 16. See the Postscript for the present position of the law.

70. The apparent difference in the date of commencement of these two Federal Acts is due to the fact that in the 1954 Constitution, Marriage and divorce of all types were within the residuary list of the Regional legislatures. But in 1957, Monogamous Marriage and matrimonial causes relating thereto were taken off the residuary list of the Regional legislatures and placed on the exclusive list of the Federal Parliament. And, as there are no federal courts of first instance in the country, jurisdiction in respect of matrimonial causes was conferred on Regional Courts by the State Courts (Federal Jurisdiction) Act, 1958, which, as we have seen, also provided for the application of the English law on this subject. The identical Regional provisions on monogamous marriage and matrimonial causes (See s.32 of the Northern Region of Nigeria High Court Law, 1955, s.22 of the Western Region of Nigeria High Court Law, 1955 and s.16 of the Eastern Region of Nigeria High Court Law, 1955) were repealed. But since Lagos was then a Federal Territory and all its laws enacted by the Federal legislature, the High Court of Lagos Act was preserved. The scope of the State Courts (Federal Jurisdiction) Act was, therefore, restricted to the former Regions.

71. Emphasis supplied. The original text reads "the High /cont....

had legislated on the basis that there should be a common Nigerian domicile for the exercise of jurisdiction in divorce and other matrimonial causes. But unlike the Australian, the Canadian and the South African Acts, none of these Nigerian provisions contains the slightest hint that the domicile of a person in Nigeria generally should be the basis of the High Courts' jurisdiction in divorce and other matrimonial causes. While it is unnecessary to express an opinion on the validity of Dr. Morris' second test also, according to this view, the more coincidence of matrimonial causes law throughout the Nigerian Federation, established by two separate Acts of the Federal Parliament, will not equate the basis of jurisdiction on this subject with that of Australia.

It cannot be too strongly emphasised that the High Court of Lagos Act applies exclusively to the Lagos State. Furthermore, it is clear from the language of the State Courts (Federal Jurisdiction) Act, that each of the other state courts is impelled to exercise its jurisdiction in divorce and other matrimonial causes separately and indpendently of the other. Hence the use of the phrase "The jurisdiction of the High Court of a State" and not "The jurisdiction of the High Courts of Nigeria". Yet the judgment of Fatayi-Williams, J., in Odiase's case proceeded on the basis that Parliament had not only provided for the application of a uniform substantive law on matrimonial causes in Nigeria but also created, by implication, "unity of

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F/notes 71 & 72 cont. from previous page.

Court of a Region" but by s.(1 (b) of the States Creation (Transitional Provisions) (Amendment) Decree, 1967, reference to a "Region" in any enactment must be construed as reference to a "State".

72. State Courts (Federal Jurisdiction) Act, 1958, s.4. See the Postscript for the present position of the law.

jurisdiction"[73] on this subject. As pointed out by Williams, J., in Arinze v. Arinze,[74] the view of Barry, J., in the Australian case of Lloyd v. Lloyd[75] seemed to have influenced Fatayi-Williams, J., in the Odiase's decision. Thus in Lloyd's case, Barry, J., had said that

> "The Parliament of the Commonwealth of Australia has legislated either on the basis that, independent of the Act, there is now an Australian domicile, or that, for the purposes of the law it has made relating to matrimonial causes, there is now an Australian domicile by virtue of the Act." [76]

In Odiase's case, Fatayi-Williams observed:

> "It is, I think, difficult to escape the conclusion that in applying, albeit by implication, the Matrimonial Causes Act, 1950 [an English statute] .... to the whole Federation, Parliament has legislated on the basis that, independent of the Act, there is a Nigerian domicile, or that, for the purposes of that Act, [i.e. for purpose of jurisdiction in matrimonial causes] there is now a Nigerian domicile." [77]

There is no doubt that the language of Barry, J., was directed to the interpretation of an Act in which reference to "Australian domicile" is made and which unified the jurisdiction of the Australian state courts for proceedings in matrimonial causes. Indeed, it is provided in section 27 of the Australian Matrimonial Causes Act that all courts having jurisdiction under the Act should act severally in aid of and be auxiliary to each other in all matters under the Act. The intention of the

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73. Odiase v. Odiase [1965] N.M.L.R.196 at p.198.
74. [1966] N.M.L.R. 155.
75. [1962] V.R.70.
76. Ibid at p.71.
77. Emphasis supplied. Odiase v. Odiase [1965] N.M.L.R. 196 at p.199.

Nigerian Federal Parliament appears different. It unified the law on matrimonial causes but leaves intact the state courts to exercise a separate jurisdiction in matrimonial causes. Support for this contention is afforded by section 101 of the Sherrifs and Civil Process Act.[78] The section sets out certain specified situations where the court of a state may proceed in a suit against a defaulting defendant who had been served inter-state according to the provisions of the Act. One of these is that if the court of a state in which a writ of summons was issued is satisfied "in a matrimonial cause, that the domicile of the person against whom that relief is sought is within that State[79] or part of the Federation",[80] then the court, on the application of the plaintiff, may proceed with the suit in the absence of the defendant. It is surprising that no reference appears to have been made to this important section in any of the controversial discussions about the area of domicile in Nigeria. It, however, dismisses, it is submitted, the view that the Federal Parliament had impliedly recognised that there is a common Nigerian domicile for purposes of jurisdiction in matrimonial causes.

Our conclusion, therefore, is that whatever the merits of a two-dimensional concept of domicile in a federation[81] the state of existing law in Nigeria does not permit the adoption of this view by the courts. Domicile for all purposes should be fixed within a State. Any decision adopting the two-dimensional concept of domicile will result in an unnecessary straining of words to achieve an objective which the courts consider to be

78. Cap. 189, Laws of the Federation of Nigeria (1958 ed.). A federal Act s.101 of which applies throughout the Federation.

79. See note 71 supra. Sheriffs and Civil Process Act, s.101(1)(f)

80. Emphasis supplied.

81. See Chapter 4 for domicile as basis of jurisdiction in matrimonial causes.

ideal for Nigeria. But in so far as this interpretation is not compatible with the express language of the Federal Act on matrimonial causes jurisdiction and so long as it is contrary to the intention of the Federal Parliament as clearly shown in the relevant provision of the Sheriffs and Civil Process Act, it must be rejected as a fumbling effort resulting in a judicial error. By adopting this view, the judges will not only be thwarting the clear intention of the Federal Parliament but also arrogating to themselves a role greater than that allocated to them under the constitution, i.e. that of replacing Acts of Parliament with judicial decrees of their own. If a common Nigerian domicile as basis of jurisdiction for matrimonial causes is desirable in Nigeria, only the Federal Parliament can bring it about. It is our opinion that it has not done this.[82]

C. REFORM OF THE CONCEPT OF DOMICILE IN NIGERIA.

The reform of the law of domicile in Nigeria should be viewed with regard to the following factors. First, Nigeria is historically comprised of several tribal municipalities or "pseudo-nations" which, as a result of the British influence, were later incorporated into a national entity. Political unification apart, a notable feature of this historical background is that the citizens of Nigeria still cling tenaciously to the idea of "traditional" or "ancestral home" which is greatly accentuated by the system of extended family prevailing within the country. This ancestral home is still determined by ethnic

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82. See Postscript for the present position as regards the area of domicile for purposes of jurisdiction in matrimonial causes in relation to monogamous marriages.

criteria. In this respect, it is interesting to note that the pattern of life in Nigeria, at present, appears more parochial than in England in the second half of the 19th Century - the era of the evolution of the concept of domicile - when, in the words of Professor Cheshire, "England was a nation of enterprising pioneers, most of whom regarded their ultimate return home as a foregone conclusion."[83] Secondly, Nigeria, in legal terminology, is also a federation of many states in each of which, as has been shown above, domicile for all purposes can be fixed. Thirdly, there is considerable mobility of persons inter-state and internationally. This multifarious and active intercourse between persons which is dictated by economic necessity of finding new hopes in distant places, is greatly encouraged at the inter-state level by the federal constitution which guaranteed unrestricted movement to persons within the federation.[84]

It has been observed in Chapter I that the effect of federalism (or more appropriately, regionalism) in Nigeria is that the Nigerian private international law, like other federations, becomes a branch of law for the regulation of inter-state and international conflicts. The problem engaging the attention of a student of the Nigerian private international law is how the concept of domicile evolved solely with reference to the conditions of a unitary country, i.e. England, should be adapted for employment not only for international transactions but also for inter-state purposes in view of the above sociological factors.

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83. Cheshire: Private International Law (7th ed.) p.164.

84. Federal Republican Constitution of Nigeria, 1963, s.27.

1. MERITS AND DEMERITS OF DOMICILE IN NIGERIAN LAW.

While not being dogmatic as to the relative advantages of domicile (as opposed e.g. to Nationality) as the pre-requisite for the determination of the personal law, where continuity of application of the same law is important, domicile seems the more appropriate territorial basis of personal law in Nigeria where the same nationality embraces many systems of law. Furthermore, the principle of domicile appears to afford an easy means of transition from a territorial to a non-territorial basis of personal law in so far as religion as well as membership of an ethnic community are other criteria for determining the personal law of a person on a non-territorial basis. Perhaps some illustrations will make the last statement more explicit. A Ceylonese who acquires a domicile of choice in the Kano State will firstly be subject to the general territorial law of the State. If, however, he subsequently accepts the Moslem religion he should in principle be able to have the validity of his marriage contracted under the Moslem law determined by that law. Similarly, on the inter-state level, a Western Nigeria domiciliary who acquires a domicile of choice in the Kwara state would be amenable to the customary law of that state if he later adopts the mode of life of the autochthonous community there.[85] In addition, the principle of domicile as a criterion for the territorial ascertainment of personal law has the positive virtue of certainty as it is settled law that a person cannot be without domicile,[86] whereas the adoption of nationality as the basis of

85. In Yesufu Kosoko v. Shaba Nakoji 1959 .N.N.L.R.15, the fact of the plaintiff's "permanent residence" in the former Northern Region of Nigeria and his acceptance of the Muslim faith were held to entitle the Northern Nigerian native court to assume jurisdiction and apply the local customary law to him.

86. Udny v. Udny (1869), L.R. 1 Sc. & D. 441; Bell v. Kennedy (1868), 1 Sc. & D. 307.

personal law in other countries[87] has led to difficulties in cases of persons without nationality or dual nationalities.

In Nigeria, however, these advantages of domicile as the criterion of determining matters of personal law and for transition from a territorial to a non-territorial basis of personal law are bogged down in the morass of excessively rigid rules devised for the change of domicile and due to the tenacity of the domicile of origin. The law as regards the ascertainment of a person's domicile of origin and that of a dependent person presents little or no difficulty even if the unrealistic attitude of operating it often results in the actual connection between a person and his place of domicile becoming somewhat tenous.[88] It is settled law that everybody obtains at birth a domicile of origin[89] and that the domicile of a dependent person, except in few obscure cases,[90] follows, as a general rule, that on whom he is dependent and continues until he has capacity to change it. Any proposals for reform should, therefore, be directed towards the domicile of choice which is the practical area for its operation. Attention will be directed in this respect to the definition of domicile which presupposes the severance of all ties connecting a person with a previous domicile of origin

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87. For the list of countries operating the principle of nationality as the basis of personal law, see Rabel: The Conflict of Laws: A Comparative Study, Vol.1, pp.121-123. This list must now be read as excluding Israel which has adopted domicile as the basis of personal law. See below.

88. See Re O'Keefe [1940] Ch.124.

89. See Dicey & Morris: Conflict of Laws (8th ed.)p.84 and the authorities therein cited.

90. Relating to the domicile of lunatics, adopted children and children legitimated by subsequent marriage of the parents and by acknowledgment. Also the domicile of children under custody.

or of choice before he can acquire a new domicile. This will be done with a view to showing that the facts of life and the federal structure of government in Nigeria do not permit of this rigid view, at least, for inter-state conflicts.

2. DEFINITIONS OF DOMICILE

The starting point in the definition of domicile under Nigerian law is Whicker v. Hume.[91] In that case, Lord Cranworth defined domicile as "home, the permanent home; and if you do not understand your personal home, I am afraid that no illustration drawn from foreign writers or foreign language will very much help you to it". A year later the definition was aplified by Kindersley, V.C., in Lord v. Colvin [92] where he remarked that:

> "That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home."

Later decisions, while repeating that a permanent home constitutes domicile, have introduced a further element of rigidity into the definition. Thus in Moorhouse v. Lord, [93] Lord Chemsford[94] having expressed dissatisfaction with the above definition of Kindersley, V.C., proposed a new solution by saying:

> "Now, ... [the] definition.... of the Vice Chancellor appear[s] to me to be liable to exception, in omitting one important element, namely, a fixed intention of abandoning one domicile and permanently adopting another. The present intention of making a place a person's

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91. (1858) 7 H.L.C. 124 at 160.

92. (1859) 4 Drew. 366.

93. (1863) 10 H.L.C. 272 at 286.

94. It must be pointed out that Professor Cheshire seems to be clearly wrong in attributing this definition to Lord Cranworth. See Cheshire: Private International Law (7th ed.) p.145.

> permanent home can exist only where he has no other idea than to continue there, without looking forward to any event, certain or uncertain, which might induce him to change his residence. If he has in his contemplation some event upon the happening of which his residence will cease, it is not correct to call this even a present intention of making it a permanent home. It is rather a present intention of making it a temporary home, though for a period indefinite and contingent."

Moorhouse v. Lord and other cases accordingly established the two requirements for the acquisition of a domicile of choice, i.e. residence in a particular place coupled with an intention to remain there permanently, both of which must coincide before a domicile of choice can be acquired.

These two elements were emphasised for the Nigerian law by Coker, J., in Udom v. Udom[95] where he remarked that before it could be established that a change of domicile has been effected,

> "there must be proof of change of residence animo et facto. The subject must not only change his residence to that of the new domicile, but also must have settled or resided in the new territory cum animo manendi. The residence in the new territory must be with the intention of remaining there permanently."

In other words, a domicile once attributed or acquired can be lost not simply by residence in another territory for a given period but cum animo non revertendi. In the case of domicile of origin, the evidence required to prove such intention is more overwhelming in view of the "strongest possible presumption" in support of its retention.[96] Indeed, its almost immutable nature, i.e. that "its character is more enduring, its hold stronger and less easily shaken off", as indicated by Lord MacNaghten in

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95. (1962) L.L.R. 112 at p.117; Fonseca v. Passman [1958] W.N.L.R. at p.42.

96. Munro v. Munro (1840) 7 Cl. & Fin. 842 at 891.

Winans v. A.G., [97] has been echoed for inter-state conflicts in Nigeria.[98]

Thus, according to these statements, a Tiv, having a domicile of origin in the Benue-Plateau State, who intends to reside in the Lagos State for a fixed period, lacks the animus manendi, however long the period of residence may be.[99] Similarly, a Mid-Western State domiciliary who intends to stay in the North-Western State for an indefinite time but intends to leave the state some day will not be domiciled in the North-Western state.[1] An Italian engineering contractor, whose domicile of origin is in Italy and who intends to work in Western Nigeria until the age of 60 and then settle down permanently in Italy is still domiciled in Italy. If the Tiv dies in the Lagos state after a period of 25 years' residence in that state, the succession to his movable property must be governed by the Benue-Plateau law and, much more, the Lagos state cannot levy an estate duty on his estate. If after a period of residence of over 16 years in the North-Western state, the person from the Mid-Western state wants to divorce his wife, he must incur the trouble and expense of a long journey to the Mid-Western state, and possibly the risk of losing his employment, before he can file a divorce petition.[2]

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97. [1904] A.C. 287 at p.290.

98. See Adeyemi v. Adeyemi (1962) L.L.R. 70 and Udom v. Udom (1962) L.L.R. 112; James v. James, Unreported, High Court of Mid-Western Nigeria, Suit No. W/32/63 of 25/4/64.

99. A.-G. v. Rowe (1862) 1 H. & C. 31.

1. Jopp v. Wood (1865) 4 De. G. & J. & S. 616.

2. These are substantially the facts in Machi v. Machi (1960) L.L.R. 103.

3. CONCEPT OF DOMICILE IN NIGERIA CONTRASTED WITH THOSE OF CONTINENTAL AND OTHER COUNTRIES.

The Nigerian conception of domicile, as well as those of other countries taking their roots in the English law, is to be distinguished from those of continental countries, the United States of America and recently, Israel. Having had a humble beginning in what, at its earliest inception, was considered as a Roman law conception,[3] the common law concept of domicile had acquired a unique characteristic which makes it more enduring than nationality.[4] By way of comparison, the notion of domicile was defined by the Justinian's lawyers as the "place where a man has established his household and the centre of his business activities which he does not leave unless something calls him away, being absent from which he is said to be travelling and returning to which he is said to have ceased to travel".[5] Modern laws derived from the Roman law still lay stress on a person's centre of affairs or habitual residence, with little or no emphasis being placed on his intention, as a criterion for the acquisition of a new domicile. For example, in French law, domicile is no more than the place of "principal establishment"[6] of a person, i.e. primarily "as an ordinary residence intended to be stable but not necessarily perpetual".[7] In Germany, it is synonymous with the place of "permanent residence". Similarly,

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3. See Nygh: "The reception of Domicil into English Private International Law" in Tasmania University Law Review, Vol.I, p.555.
4. Rabel: The Conflict of Laws: A Comparative Study, Vol.I, p.118; Cheshire: Private International Law,(7th ed.) p.165. Cf. Graveson, "Reform of the Law of Domicile", 70 L.Q.Rev. 492 at p.497.
5. C.10 39.7
6. S. 102 of the Code Civil.
7. Donald Von Landauer: "Matrimonial Causes in French Law" in 13, I.C.L.Q. (1964) p.8.

domicile in the Spanish law is defined as the "permanent place of residence", and the Portuguese law equates it with "ordinary place of residence".

Also, most international conventions employing the concept of domicile defines it less rigidly than the common law concept. For example, Article 5 of the Montevideo Convention of 1940 which was signed by Argentine, Bolivia, Colombia, Paraguay, Peru and Uruguay provides that in so far international juridical questions are concerned, domicile should be determined by the following circumstances:

"1. Habitual residence in a given place, coupled with the intention to remain there;

2. In the absence of such a determining factor, the habitual residence in a single place of the family group composed of the spouse and the minor or incompetent children; or that of the spouse with whom the said person lives; or, in the absence of the spouse, that of the minor or incompetent children with whom the person lives;

3. The location of his principal place of business;

4. In the absence of all of these circumstances, mere residence, which shall be regarded as constituting domicile. " [8]

Similarly, Article 5 of the 1951 Hague Convention to Regulate Conflicts Between the Law of the Nationality and the Law of the Domicile, defines domicile for the purpose of the Convention as "the place where the person habitually resides unless the domicile of such person depends on the domicile of another person or on the seat of some public authority" . [9]

If it must be pointed out that the principle of domicile plays only a secondary role in the determination of the personal law of the propositus in some countries and that most matters of

8. Translation by J. Irrizarry y Puente and G.L. Williams in 37, Am. J. Int. Law, No.3 of July, 1943 at pp.142-143.

9. See Appendix B, 1st Report of the Lord Chancellor's Private International Law Committee, Cmd. 9068 at p.16.

personal law are determined by the law of nationality, the American law which, like those of other common law countries, rely on the principle of domicile as the basis of all matters of personal law defines it as the "place, usually a person's home, to which the rules of Conflict of Laws sometimes accord determinative significance because of the person's identification with that place". [10] The Restatement then proceeds to describe what it means by home as "the place where a person dwells and which is the centre of his domestic, social and civil life".[11] As explained by the editor of the Restatement, a mental attitude, the animus manendi or the animus non revertendi, plays an important role in the determination of the home of a person but is not necessarily a separate and subjective factor in addition to the factual pre-requisite of residence. According to the explanation, mental attitude towards the place where the person dwells "is not always conclusive". [12]

More recently, the traditional common law concept of domicile "with its inflexible and technical rules and exceptions which have caused unnecessary difficulties" [13] has been discarded in the law of Israel. In the Israeli Draft Family Code of 1955, an attempt was made to solve the problem of domicile by a re-definition of the concept so as to eliminate the element of intention - the animus semper manendi, as Wolff has appropriately termed it [14] - as an additional factor for the ascertainment of person's domicile of choice. We shall have cause to return to the provisions of the Israeli Draft Family Code in due course.

10. Para.11 (1), Restatement Second on the Conflict of Laws (Proposed Official Draft) Part 1, 1967, p.53.
11. Ibid., Para. 12, p.64.
12. Ibid., at p.67.
13. Avner Shaki: "Domicile in Israel Private International Law"in Studies in Israel Legislative Problems (ed. by Tedeschi and Yadin), 1966, p.188.
14. Martin Wolff: Private International Law, (2nd ed.) 1950, p.111.

The above short survey must have shown the existence of a large diversity between the various concepts of domicile in the legal systems of the world[15] and emphasised the point that each system of law adopts the concept for the particular policy the country wants to project.[16] Thus, while the continental, American and Israel laws and some international conventions speak of the place of principal establishment, permanent place of residence, or the fact of a person's centre of social or domestic life, the emphasis in the common law world is on the permanent home. The situation is further confounded by its insistence on an intention to remain in a particular territory permanently. The point which arises for consideration is whether the common law definition of domicile has any relevance to the social habits of a contemporary Nigerian Society.

4. PERMANENT HOME SYNONYMOUS WITH ANCESTRAL HOME IN NIGERIA.

It may be recalled that the concept of domicile, including its constituent elements, is a necessary part of the common law of England received into the Nigerian law. Therefore, the idea of a family establishing a permanent home, as used in the above English definitions was, and still is, employed solely with reference to the social conditions of a fully developed

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15. See Jacobs: The Law of Domicile (1887), pp.93-132 for the various definitions of domicile collected from Codes, legal literature and judicial decisions of the world. Rabel, op. cit., p.151, n.154, states that the reporter to the Institute of International Law, 1931 collected about fifty of such definitions from legal literature. See also Kennan: A Treatise on Residence and Domicile (1934), pp.1-37.

16. In China, a man who marries into the family of his wife (i.e. a chui-fu) takes the domicile of the wife; see Legal Status of Married Women (U.N. Publication) ST/SOA/35 of 1958.

English environment where the society, as well as legal precepts, like others in the Western civilization tends to be individualistic. A fundamental assumption underlying the development of the Family Law, including the concept of domicile, in these places is that a family consists of a man, his wife and minor children. Thus, for example, in his book of Family Law in England, Bromley prefaces his subject by saying that "For our purposes we may regard the family as a basic social unit which normally consists of husband and wife and their children".[17] A judicial employment of this basic social unit as the rubric around which the concept of domicile is interwoven is observable from the illustration given by Lord Westbury in Udny v. Udny.[18] Thus, to adapt the illustration of the Lord Justice, if an Englishman with an English domicile of origin breaks up his establishment in England, sells his house and furniture, discharges his servants and takes with him "his wife and children" and moves everything to Holland in search of another place of abode, and settles there for a number of years, then an English court will presumably say that he had severed connection with his domicile of origin and settled in Holland with the correct intention and consequently acquired a domicile of choice in Holland. Similarly, in Lord v. Colvin,[19] Kindersley, V.C., interpreted the latin word "Larem" or its English equivalent "household" as the "united body, consisting of a man and his wife and children and domestics living together in one abode". It seems clear, therefore, that a person's permanent home as used under the common law concept of domicile does not connote more than the fixed abode of a man, his wife and minor children.

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17. Bromley: Family Law, 3rd ed., p.1.
18. (1869) L.R. 1 Sc. & D. 441 at p.459.
19. (1859) 4 Drew 366 at p.373.

But in Nigeria, however, where a broad view is still taken of the composition of the family, the concept of domicile appears to have taken a twisted turn as the cases discussed below will show. The notion of the extended family seems to have been allowed to infiltrate into the concept of domicile through the element of intention necessary to establish a person's domicile. But first, to explain what is meant by the extended family; most Nigerian statutes dealing with the problem of the family usually make a distinction between an "extended" and "elementary" family. Even where such distinction is made, the composition of the elementary or immediate family is still wider than that in the English or the European concept. For example, an "immediate family" is defined in section 2 of the Eastern Nigeria Fatal Accidents Law of 1956 [20] as consisting of "wife or wives, husband, father, mother, grandfather, grandmother, stepfather, stepmother, child, grandchild, stepchild, brother, sister, half-brother, half-sister, nephew and niece". The Federal Workmen's Compensation Act [21] defines by implication an elementary or immediate family, in a paternal system, as consisting of his "mother, father, wife, son, daughter, brother, sister, father's father, and father's brother". In a maternal system, it includes his "mother, father, wife, son, daughter, brother, sister, mother's mother, mother's brother, mother's sister, sister's son, sister's daughter, mother's sister's son and mother's sister's daughter".[22] On the other hand, according to recent surveys into the Nigerian family law, an extended family may connote several hundreds of persons tracing their descent from a common acnestor through many generations.[23]

20. Cap. 52, Laws of Eastern Nigeria (1963 ed.).

21. Cap. 222, Laws of the Federation of Nigeria, (1958 ed.) First Schedule.

22. Ibid.

23. See Obi, Modern Family Law in Southern Nigeria, pp.8-10; Lloyd, Yoruba Land Law, p.77.

To return then, to Lord Wesbury's illustration, it will be readily apparent that the facts of the hypothetical case do not necessarily presuppose that an Ibo or Yoruba who had "settled" in a distant place has severed all connections with his place of birth, which is almost invariably his domicile of origin, so as to give rise to the inference that he did so with the intention of not returning and lead to the acquisition of a domicile of choice in such a place. He still has other members of his elementary and extended family in his ancestral home. He is perhaps still a member of the "family council" in the traditional home. Undoubtedly, it is in this place that he has an indivisible interest in the "family property", which, unless he acts in concert with other members of the family, he cannot alienate. This interest in family property he seldom abandons, even if he can. It seems clear, therefore, that while an Englishman, as a result of the individualistic nature of members of the English society, may abandon his permanent home and establish another permanent home,e.g. in Australia or Canada cum animo non manendi, or as Megarry, J., would like to put it "without the intention of returning",[24] these peculiar aspects of certain concepts of customary law and the communal nature of the Nigerian society as a whole intimately link an indigenous Nigerian citizen with his own clan or tribe. These are indirectly introduced into the concept of domicile through the element of intention which involves an inquiry into all aspects of a man's life.[25] As a result, it is extremely difficult for a Nigerian person to adduce facts from which a prima facie evidence of his intention to stay permanently away from his place of birth could be inferred; since notwithstanding his manner of life, social position, educational attainment or the length of time he had had connection

24. Re. Flynn decd. [1968] 1 W.L.R. 103 at p.113.
25. See Drevon v. Drevon (1864) 34 L.J. Ch. 129 at p.133.

with a foreign place, he has throughout that period, as a result of these strong family ties, a homing tendency.

It is our conviction that the difference in social attitude accounts for why the strict[26] application of the received English conception of domicile has resulted in the fact that few Nigerians, if any, since the division of the country into separate legal units in 1954, have been able to acquire a domicile of choice for purposes of judicial jurisdiction in any other Region or state apart from where he or his predecessors were born. We shall now consider some of the Nigerian cases involving the ascertainment of domicile in order to show how communal orientation has frustrated the acquisition of domicile of choice away from the ancestral or traditional home.

In the Lagos case of Uchendu v. Uchendu, [27] the husband and wife were born of parents in Ufuma in Eastern Nigeria where they had their domicile of origin. The husband instituted divorce proceedings against the wife on the ground of adultery. In his petition, he alleged that both the petition and the respondent were domiciled in Lagos. The issue of jurisdiction was not raised by the respondent who seemed to have acquiesced in the allegation that the parties were domiciled in Lagos. It is not known from the meagre evidence in the report when the parties came to Lagos. It was, however, clear that the parties were living in Lagos and that the petitioner had established some sort of business there. The judge, however, found it necessary to consider the issue of jurisdiction. Jurisdiction in matters of divorce, he said, cannot be conferred on the court by consent of the parties. The petitioner testified that he had "formed the intention never to return to his original home",

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26. Emphasis supplied.
27. (1962) L.L.R.101.

that he had purchased a plot of land in Lagos on which he intended to build (this was denied by the respondent), and that he intended to bring his mother to live with him in Lagos. The judge, as a matter of fact, found that he still visited his "home-town Ufuma from time to time and has one or both of his parents living there".[28] Onyeama, J., therefore regarded the evidence as inadequate to prove an intention to live for an indefinite time in Lagos and so establish the acquisition of a domicile of choice there. One could have found it difficult to understand why much emphasis was attached by both the Judge and the petitioner to the place of residence of the parents of an adult person and what he intended to do with them in showing his intention to live permanently in a distant place except in a society where the family is not composed simply of a man, his wife and minor children and where family attachment is strong. On the other hand, if it was meant to show that the petition did not leave Eastern Nigeria with the intention of not returning, then it only confirms the contention that a Nigerian seldom abandons animus non revertendi the place where his parents and other relatives are to be found, to settle permanently in another place.

In Adeyemi v. Adeyemi,[29] a case concerning an undefended divorce petition presented by the wife-petitioner, it was alleged that the parties were domiciled in Lagos. But as the parties were from Ijebu-Ode in Western Nigeria, Onyeama, J., was again faced with the question of the jurisdiction of the Lagos High Court to dissolve the marriage. He started, as required under the present law, by trying to ascertain the domicile of origin of

28. Uchendu v. Uchendu (1962) L.L.R.101 at p.102. Emphasis supplied It must be noted that Onyeama,J., did not say that the petitioner visited his home-town from time to time because he had his parents there. Rather he seemed to have assumed that so long as Uchendu had his parents in Eastern Nigeria, he could not establish a domicile away from them.

29. (1962) L.L.R.70.

the husband which he found to be in Western Nigeria. Then he proceeded by saying that once the domicile of origin had been established the burden is then thrown on the party alleging a change to prove that a new domicile had been acquired. This in turn necessitated a review of the life history of the husband to discover whether or not he had acquired, by the relevant time, a domicile of choice by residence in Lagos with the intention of living there permanently. The evidence of the wife is also instructive as to the view that the communally oriented Nigerian seldom has the intention of severing all links with his ancestral home.

The wife, while stating that the husband had expressed the desire to live in Lagos permanently, that he never liked to go to his "home-town", that his parents were dead and that he had bought a plot of land in Lagos, nonetheless answered in reply to the question put by the learned judge that the "family home" of the husband was still at Ijebu-Ode in Western Nigeria. When it is recalled that the parties (all adults, the husband being 48 years old) had resided in Lagos for about fourteen years, a person unacquainted with the social pattern in Nigeria may be justified in wondering why the "family home" of the husband should still be stated as being in a different jurisdiction. By this, as already explained, was meant the place where the husband had his origin and still had other members of his extended family, i.e. the ancestral home. This peice of evidence had a fatal effect on the claim of the wife that both she and the husband were domiciled in Lagos. Accordingly, the judge was not impressed by the wife's claim that the husband had formed a settled determination to make Lagos his permanent home. If ability to acquire a domicile of choice depends on such factors like the location of person's "family home" it must be regarded as doubtful whether a Nigerian person's domicile or origin can ever be changed under

the present concept. But in point of fact, one would have been surprised if the learned judge, aware of the group consciousness in Nigeria, regarded the assertion by the wife that they have regarded Lagos as their permanent home as more than a desparate attempt by an injured wife to establish the parties' permanent home in a place where the stark realities of life in Nigeria and the present definition of domicile render almost impossible, so as to give the court jurisdiction to dissolve the marriage. Regardless of the fact that the uncontradicted evidence of the wife established a good cause of action, the petition, like most others, was dismissed for lack of jurisdiction.

Also in another decision of the Lagos High Court in Machi v. Machi[30] the point which seemed to weigh most in the mind of De Lestang C.J., in deciding that the parties who had been resident in Lagos for over a period of sixteen years were not domiciled there so as to enable him to assume jurisdiction in respect of an undefended divorce petition brought by the wife, was that the "evidence shows .... that they[the parties] originated from the Eastern Region of Nigeria". Having established that the husband initially came to Lagos to find employment, he seemed to have dismissed the possibility that the Husband might subsequently have formed the intention of residing permanently in Lagos. This, in our view, is only explicable on the basis that the judge being aware of the pattern of life in the country, readily assumed that the parties, who were Ibos, rarely establish a permanent home cum animo non revertendi away from the place where they originate. Alternatively, the decision might have been based on evidence which the judge could not accept to rebut the presumption of the domicile of origin. However, this was not so stated in the judgment. The only reason given by

30. (1960) L.L.R.103.

De Lestang C.J., for finding that the Lagos High Court was not the court of domicile of the parties was that they originated from Eastern Nigeria, a statement which he repeated twice in his judgment. Indeed, the wife, presumably realising the difficulty of proving an intention to reside permanently in Lagos even after the husband's sixteen years' residence there, simply averred they were domiciled in Nigeria. De Lestang, C.J., therefore dismissed the case even though he found as a matter of fact that the husband had deserted the wife and ceased to support her and the four children of the marriage for about four years.

The only case in which it has been held obiter that a change from a previous domicile of origin to one of choice was successfully established inter-state in Nigeria is Odiase v. Odiase.[31] But as will be presently shown, the rules of domicile applied in that case appears less rigid than the traditional common law rules. The decision in Udom v. Udom[32] is not in point owing, it is submitted, to the misapplication of the rules of domicile in that case. Udom's case concerned a divorce petition by the wife to dissolve a two-year old marriage on the ground of the husband's cruelty. In her petition, the wife alleged that the parties were domiciled in Lagos while the respondent averred that they were domiciled in the Eastern Region of Nigeria. The evidence established, however, that the respondent's mother was a native of Lagos where she had a domicile of origin and where she and the respondent's father, a native of Calabar in Eastern Nigeria "had always lived". It was not clear when the father came to Lagos. It appeared that the father went back with the respondent to Eastern Nigeria to reside for a brief period before the father died there in 1947. The mother

31. [1965] N.M.L.R.196.
32. (1960) L.L.R.112.

appeared to have stayed in Lagos throughout. In the same year, immediately after the death of his rather, the respondent returned to Lagos to live with his mother. The respondent was at this time 14 years old.[33] There was no form of marriage between the respondent's father and mother. According to the evidence of the petitioning wife which the judged accepted,[34] "his father and mother were not really married ... they just met each other and started to produce children". In other words, since there was no evidence that Mr. Udom was acknowledged under customary law, he was illegitimate. As regard the issue of jurisdiction, Coker, J., decided that

> "after reviewing the authorities and expressing my own views with regards to the issues of fact in this matter, I have come to the conclusion that the petitioner had discharged the burden of proof placed upon her in establishing that the respondent had acquired a domicile of choice in Lagos at the time of the marriage and indeed at the time of the jurisdiction to entertain and decide the matter which is at present in issue".

It is submitted that the facts of the case did not justify Coker, J.'s finding of a domicile of choice in Lagos and that the domicile of origin of Mr. Udom had always been in Lagos. It is a well established principle of Nigerian private international law that an illegitimate child takes as his domicile of origin that of his mother at the time of his birth.[35] Since Coker, J., found that Udom's parents were never married, i.e. that he was illegitimate, he had as his domicile of origin that of his mother which had always been in Lagos. It is therefore erroneous for the learned judge to have started on the premise that the domicile of origin of Udom depended on that of his

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33. Details of the Marriage Certificate of the Udoms obtained at the Somerset House in London showed that Mr. Udom was 27 years old in 1960 which means he was born some time in 1933. A certified true copy of this Certificate was admitted in evidence as Ex. B. by Coker, J. See Udom v. Udom (1960) L.L.R. 112 at p.113.

34. Udom v. Udom (1960) L.L.R. 112 at p.118.

35. Re Grove (1888), 40 Ch.D.216; Udny v. Udny (1869) L.R.1 Sc.& D. 441.

natural father in Eastern Nigeria. Only his mother could have been legally entitled to change Udom's domicile during minority. The fact that Udom had a different residence from that of the mother during his minority did not alter the position. And in so far as he returned to Lagos during his minority and continued his residence there up to time the petition was presented, that fact alone was conclusive proof that Udom's domicile of origin in Lagos was retained throughout. This misapplication of the rules of domicile, it is submitted, vitiates the decision of Coker J., that Udom acquired a domicile of choice in Lagos. In fairness it should be added that this decision would not have been fatal to the petitioner in that the Lagos court could still have been able to assume jurisdiction in respect of the divorce suit. But owing to certain peculiar circumstances attaching to a person's domicile of origin it is as well necessary to arrive at the correct nature of a person's domicile.

Odiase's case however proceeded on a different basis which amounts, in our view, to a radical but a welcome change in the concept of domicile in Nigerian private international law. The facts of the case, in brief, are as follows. The respondent-husband was a native of Benin-City in the Mid-Western state of Nigeria. Until August 9, 1963, the Mid-Western state was part of the former Western Region of Nigeria. On that date, however, it became a distinct legal unit within the federation of Nigeria. It therefore became a territory governed by a separate legal system in which the domicile of a person could be fixed.[36] In principle the effect of this division into two of territory formerly comprised of the old Western Region of Nigeria is that

36. Adeoye v. Adeoye (1962) N.N.L.R. 63 at p.65; See also Okonkwo v. Eze (1960) N.N.L.R. 80 and Adeyemi v. Adeyemi (1962) L.L.R.70. Cf. Re O'Keefe [1940] Ch.124; Re M. [1937] N.Ir.151 (Northern Ireland) and Re P. [1945] Ir. Jur. Rep. 17 (Republic of Ireland).

all persons born in the legal unit now constituting the Mid-Western state are deemed to have had their domicile of origin in the state.[37] The husband in this case therefore had a domicile of origin in the Mid-Western state. Divorce proceedings was however instituted by his English wife in the High Court of Western Nigeria. At the time the petition was presented, the husband had taken employment as a Magistrate under the Mid-Western state government. He was stationed in Ubiaja in the Mid-Western state. The wife's petition alleged that the parties were domiciled in Nigeria while the husband contended that he was domiciled in the Mid-Western state. Since the domicile of a wife follows that of the husband on marriage it automatically follows the husband was alleging that the domicile of the wife was also in the Mid-Western state. The connection of the husband with that part of what is now known as Western state of Nigeria did not appear to be more than residence in Ibadan, the capital town, where he practiced law, for about three years.[38] It is not stated in the report of the case when the husband actually resumed duty in the Mid-Western state. But it does appear that the parties agreed that the wife and the children of the marriage should continue to reside at Ibadan, Western Nigeria.

Having first assumed jurisdiction on the basis of the "Nigerian domicile" of the parties, Fatayi-Williams, J., held in his alternative decision that, in case he erred in his view that

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37. See foonote 36, supra.

38. The impression given by the facts of the case as stated by Fatayi-Williams J.,was that the husband practised throughout in Western Nigeria before his assumption of duty in the Mid-Western state. And as a Barrister of less than three years' standing is not appointed as a Magistrate in the Mid-Western state, it must be assumed that Odiase was actively in practice in Western Nigeria for at least three years before his appointment as a Magistrate.

the Federal Parliament had impliedly created a Nigerian domicile for the purpose of jurisdiction in matrimonial causes, the parties were domiciled in Western Nigeria. The reasons given for this alternative view were as follows: That on the husband's return from the United Kingdom where he studied law in 1962, although a native of Benin-City,i.e. the capital city of what now constitutes the Mid-Western state, he settled with his wife and children in Ibadan, Western Nigeria. Out of the various items of furniture, costing about £854 which they acquired, all the husband took with him to the Mid-Western state on his assumption of duty there as a Magistrate were one carpet, one dining chair and two cushions. He paid regularly £10.10s. a month as rent for the house occupied by the petitioner and the children in Ibadan. In addition, he sent regularly £10. a month presumably for their maintenance and paid the children's school fees from time to time.

It will be readily observed that Fatayi-Williams, J., did not follow the traditional line of ascertaining the domicile of origin of the husband and then proceeding by way of enquiry into his family life to discover whether he had shaken off his domicile of origin. Neither was it established whether the continued residence of Odiase in Western Nigeria after the creation of the Mid-Western state amounted to an election to fix his domicile in Western Nigeria. If Odiase had acquired a domicile of choice in Western Nigeria, what was his intention in seeking and accepting a position in the Mid-Western state? Did his domicile of origin not revive by his return to the Mid-Western state? Did his acceptance of an office for life in the Mid-Western state not raise a strong presumption that his domicile had shifted to the place where he had to exercise his duty? These and other matters which are relevant for ascertaining the

intention of the husband - respondent were brushed aside by the learned judge. According to him "there is only one inference to be drawn from all these overt acts and that is that the respondent had no intention of making his permanent home in the Mid-West". One would have expected that the judge would have been bond enough to say that the list of hard cases in other Nigerian states' jurisdictions had revealed the injustice caused, at any rate in matrimonial causes, by a strict adherence to the English conception of domicile in Nigeria and that a reform which will remove intention as a subjective factor in establishing a domicile of choice under Nigerian law is desirable. Nevertheless, it seems clear that the facts leading Fatayi-Williams, J., to the finding of Odiase's domicile in Western Nigeria are all indicia of the place of "principal establishment". His view in this respect reveals a striking similarity to the third presumption in the Code of Domicile suggested by the English Private International Law Committee. It reads as follows:

> "Where a person is stationed in a country for the principal purpose of carrying on a business, profession or occupation and his wife and children (if any) have their home in another country, he shall be presumed to intend to live permanently in the latter country."

His judgment, therefore, seems a deliberate relaxation of the rigorous rules of proof of domicile in an effort to do effective justice between the parties without expressly saying so. The reforming zeal necessitating this change of emphasis is therefore supported even though one is apprehensive whether Odiase's case is the appropriate situation for the application of this desirable reform in view of the respondent's more substantial connection with the Mid-Western state, his state of origin.

To recapitulate, the objections to the present definition of domicile in Nigeria, apart from the fact that it imposes on the judges enormous and at times almost insoluble evidentiary

problems,[39] are that it is not evolved in response to the social conditions in Nigeria. It ties citizens of Nigeria to their "ancestral" or "family homes", a term which, by accident of history, has become synonymous with the permanent home as the cases discussed above have shown. Not surprisingly, it prevents them from regulating their personal rights in accordance with the law of the place with which they have the most real and substantial connection. Unless the line of approach adopted in Odiase's case is taken up, at least for inter-state conflicts in Nigeria, the group consciousness and ethnic identity of the Nigerian people will not permit the acceptance of the suggestion made in Whicker v. Hume [40] that it should be much easier for a change of domicile from one sub-division of a country to the other. If the law of domicile in the Nigerian private international law is to be vaunted as affording to a person the capability to be master of his own destiny in the choice of the legal system that should regulate his personal law, it must be so defined

39. The two presumptions existing under the present law of domicile appear unhelpful; rather they seem to make the proof of domicile of choice more difficult. One is that residence of a person in a country is prima facie evidence of his domicile: Bruce v. Bruce (1790), 2 B. & P. 229 at p.231; Bempde v. Johnstone (1796), 3 Ves. Jun. 198 at 201; King v. Foxwell (1876), 3 Ch. D. 518. Even though it was stated in Hodgson v. De Beauchesne (1858), 12 Moo. P.C. 285 at p.329 that if residence is so long and so continuous it constitutes an incontrovertible evidence of domicile that only an actual departure from the country in which a person resides would displace it, nonetheless, it is of "small practical importance since it easily is rebuttable by the mere fact that a person once had a domicile in a country in which he previously resided. Hence it is pointed out by Dicey and Morris, op.cit. 7th ed., p 91 that the presumption is only useful in cases where a person's domicile of origin is unknown e.g. in determining the domicile of a foundling or a vagrant whose ancestry cannot be traced.

The second which is often employed is that a person's domicile of origin continues until displaced by a person alleging the contrary. Indeed, as have been observed above, "its character is more enduring, its hold stronger and less easily shaken off", Winans v. Att.-Gen. [1904] A.C. 207 at p.290; which was cited with approval in Adeyemi v. Adeyemi (1962) L.L.R.70 and Udom v. Udom (1962) L.L.R.112. Therefore, this presumption does not, also, aid the change of domicile from that of origin to one of choice. Rather it makes it more difficult.

40. (1858) 7 H.L.C.124.

that it will make it easy for a Nigerian to change his domicile from one Nigerian state to the other even if in international conflicts it preserves the real attachment of most Nigerians to their place of origin. In other words, domicile in Nigerian law should be a composite concept which takes account both of the need for stability of connection in certain situations and also the necessity to permit its severance in others.

As previously stated, the personal laws of most Nigerians are determined by the customary or Moslem laws to which they are subject. The scope of domicile as a criterion for determining matters of personal law is, therefore, necessarily limited. Moreover, the law on most matters in which domicile is relevant is fairly similar or identical in the Nigerian states, e.g. a uniform non-customary marriage and divorce law, identical state laws on legitimation per subsequens matrimonium and a common basis of succession laws. Also, the proximity of the states, making room for easy accessibility of legal information, is bound to produce a state of affairs under which any worthwhile legislative reform in one state will have tremendous effect in the others. In view of these factors we could see no justification for requiring an intention to reside permanently in a place as a subjective and independent factor in the acquisition of a domicile of choice under the Nigerian conception of domicile.

5. THE REFORM PROPOSALS IN ENGLAND, CANADA AND KENYA.

Since the Nigerian conception of domicile is based on that of English law, it might be contended that any reform proposed under that law or any system of law operating the English concept should be closely examined as regards its possible application in Nigeria. Reform of the law of domicile has been considered in three countries in the Commonwealth, viz., England,

Canada and Kenya. The proposals recommended for adoption in each of these countries will be found in the Appendices A, B and C of this work. In the first report of the Lord Chancellor's Private International Law Committee,[41] the Committee found two serious defects in the present law of domicile. These are (a) the excessive importance attached to the domicile of origin and (b) the difficulties involved in proof of intention to change a domicile. Of course, Nigerian law has these defects. The Committee then considered whether domicile should mean no more than habitual residence of person in a given place so as to bring the English conception into line with the continental doctrine. Alternatively, it was suggested by the minority members of the Committee that the animus necessary to establish a domicile of choice should be defined as a present intention of living in a place for "an unlimited time".[42] These proposals were, however, rejected by the Committee on the assumption that these views would have consequences unacceptable to English public opinion. It was stated that:

> "For centuries, people have gone into the world from this country [England] intending ultimately to return and without any intention of severing their connection with the British legal system and the ideas underlying it. It would not be in harmony with the temper of the British people if those who happen to be living abroad had to be told that there was no method whereby they could continue to regulate their lives according to the familiar British conceptions. It should also be remembered that a country which does not apply Nationality as a yardstick in matters of private international law is bound to substitute for it a strict test involving a measure of permanence."[43]

In the result, the Committee proposed the retention of the existing definition of domicile but recommended the adoption of three

41. Cmd. 9068, para.8, p.5.
42. Ibid., para.7
43. Ibid.

presumptions which will facilitate the proof of a person's intention. They are as follows:

1. Where a person has his home in a country, he shall be presumed to intend to live there permanently. 2. Where a person has two homes, he should be presumed to intend to live permanently in the country in which he has his principal home. 3. In the case of a businessman, or professional person stationed separately from his wife and children in a place for the sole purpose of carrying on his trade or profession, he should be presumed to intend to live in the country where his wife and children are to be found.[44] In the opinion of the Committee these presumptions should not be made too difficult to rebut.[45] For the reasons stated above, it is submitted that it will be quite easy in Nigeria to rebut these presumptions, except perhaps in undefended divorce cases in which the existence of these presumptions will make the judges desist from asking where the "family home" of a person is. But in other cases where the issues are keenly contested, the same problems of group identity of the Nigerian people will still arise. Moreover, it is not inconceivable that the second presumption proposed by the Committee will still result in the domicile of a person being equated with that static phenomenon, the "family home".

It may be pertinent to observe that even as regards the English law which is uncomplicated by a federal structure and communal orientation like the Nigerian law, the proposals of the English Private International Law Committee that the present definition of domicile should be retained was severely criticised by the House of Lords in the recent case of Indyka v.

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44. Cmnd. 9068, p.15, Art.2 of the Code of the Law of Domicile.

45. Ibid., para.15, p.8. These recommendations of the Private International Law have not been accepted. For a detailed account of the Domicile Bills especially that of 1958 which sought to implement the proposals of the Committee, see Michael Mann: "The Domicile Bills" in 8 I.C.L.Q.(1959) p.457.

Indyka.[46] Their Lordships' statements in the case foresee a future House of Lords' decision departing from the present strict definition of domicile. Not less than three of the five Law Lords offer some scathing remarks about the English concept. Lord Reid makes a valuable historical point that the jurists on whom the early judges relied as authorities for establishing the concept of domicile used that term not in the strict sense adopted by recent English cases but in the sense of habitual residence.[47] Lord Pearce lamented the excessive rigidity introduced into the conept especially by the two decisions in Winans v. Att.-Gen.[48] and Ramsay v. Liverpool Royal Infirmary[49] and suggests that "until this rigid view of domicile is modified so as to accord more nearly with the views of other countries who look to domicile as the test [for matters of personal status] it will give rise to constant difficulties".[50] In his opinion, the view of the minority of the Private International Law Committee which would want domicile defined as the country where a person establishes his home with a present intention of living there for an unlimited time would be a wiser proposition than retention of the existing definition which was recommended by the majority.[51] Finally, Lord Wilberforce contrasted the English concept of domicile with the American and Continental ones and observed that later developments in English law have meant that the English conception of domicile frequently does not represent the community to which people belong,[52]

46. [1967] 3 W.L.R.510.
47. Ibid., pp.520-521.
48. [1904] A.C.287.
49. [1930] A.C.588.
50. [1967]3 W.L.R. 510, at p.537.
51. Ibid.
52. Ibid., at p.551.

and that the principle of English law that a wife could not acquire a separate domicile, even after judicial separation or abandonment by her husband could cause great hardship to a wife.[53] But since the question before the House was not that of domicile, but one concerning the recognition of a foreign divorce decree, their Lordships had no alternative but to "acknowledge the existence of the wide gap" that lies between the English concept and that of other countries" "until a question of domicile comes before [their] Lordships".

The Canadian Draft Domicile Act does not depart in any significant way from the English concept of domicile. Section 5 of the Draft Act provides that "a person acquires and has domicile in the state and in the subdivision thereof in which he has his principal home and in which he intends to reside indefinitely". Thus, as could be observed, the only difference between the Canadian definition and the English one is that instead of the Canadian Draft Act using "permanently" to define the intention with which a person resides in a country, it substitutes the word "Indefinitely". This appears only a difference in words and not in substance. It is on this basis that the "superficially slight palliative" introduced by the Canadian Draft Domicile Act[54] seems incapable of support.

The Kenya Commission on the law of Marriage and Divorce also recognises the difficulties involved in proof of intention to change a domicile in operating the common law definition of domicile received in Kenya as part of the law of England, but got round such difficulties in a different manner. Having

53. The statements of their Lordships in this case appear a virtual endorsement of the criticism of the concept of domicile made by Lord Denning in Re P.(G.E.) (An Infant) [1964] 3 All E.R.977 at p.980.

54. The Canadian Draft Domicile Act was recently criticised by W.S. Tarnopolsky, "The Draft Domicile Act - Reform or Confusion?" in 29, The Saskatchewan Bar Review, No.4 (1964) p.161.

adverted to the rigidity of the English concept of domicile even for purposes of a country having a unified system of territorial law as Kenya, it recommends at section 8(1) of its Draft Bill on the Law of Domicile that domicile should be defined as "residence [of a person] in a country [55] ... with an intention of making that country his permanent home". The term "permanent home" is not defined but this point seems to have been clarified to a certain extent by an important rule contained in sub-section 2 of section 8 which provides that "a person may intend or decide to make a country his permanent home even though he contemplates leaving it should circumstances change". In other words, if a person resides in a country with a present intention of settling down in that country, the fact that he intends to leave it on the occurrence of an uncertain future event will not preclude him from acquiring domicile in such country. The chief advantage of the rule would seem to lie in the fact that it throws some light on how the term "permanent home" would be construed by the courts in Kenya. In view of such provision, it is obvious that the courts would not equate it with everlasting home as in the English definition now being operated in the Country. This definition, if accepted by the Kenya Parliament, will compare favourably with that offered by Kindersley V.C., in Lord v. Colvin [56] where he stated that

> a person's domicile is the place where he voluntarily fixed the habitation of himself and his family with a present intention of making it his permanent home, unless and until something which is unexpected or the happening of which is uncertain should occur to induce him to adopt some other permanent home.

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55. Section 2 of the Bill defines a "country" as a sovereign state, except where the law of the state recognises that different domicils attach to different parts of that state, when it means any such part.

56. (1859) 4 Drew 366.

If the definition of domicile contained in the Commission's recommendation is adopted, Kenya would be the first country in East Africa to accept the lead given by the Court of Appeal for East Africa in resolving the problem of ascertaining a person's domicile of choice. Thus in Thornhill v. Thornhill,[57] the Court of Appeal for East Africa held that a person who had resided in Uganda for just over three years, who lived in an hotel throughout the period and stated that if he did not succeed in his business in Uganda or if things should become unpleasant for him, but who nonetheless invested money in a soluble tea business, had acquired a domicile of choice in Uganda. With this case may be contrasted that of Gordon v. Gordon,[58] where a colonial civil servant who had been in Tanzania for almost 20 years, who had married an African woman and who had majority of his assets in Tanzania, was held by the Tanzanian High Court as still retaining his English domicile of origin merely because he stated, as a realist, that if his employment were terminated he would, firstly, find another employment in Tanzania, or failing that, he would look to other East African countries for employment, and lastly, if he were still unsuccessful, then he would return to England. Thus if a similar situation as occurred in Gordon's case were to arise in Kenya, there seems to be no doubt that Mr. Gordon would be held to have acquired a domicile of choice in Kenya. For a unitary country, the recommednation of the Kenya Commission on the law of Marriage and Divorce would seem to be adequate and therefore most welcome.

But as regards a federation where domicile should be fixed within a legal district or subdivision thereof, e.g., a

57. [1965] E.A. 268.
58. [1965] E.A.87.

state of the federation of Nigeria, the definition proposed by the Kenya Commission still suffers from a major defect inherent in the traditional definition of domicile under the common law. For one of the problems involved in the definition of domicile with animus manendi, however qualified, as one of its two constituent elements is the location of a person's domicile in a federation of several states or provinces. Under the traditional common law approach, a person may be resident in Nigeria with an intention to settle permanently in the country. He may not yet have decided in which particular state he prefers to settle. Since domicile signifies connection with a territory subject to one system of law, such a person will not be domiciled anywhere in the country until he forms an intention to reside permanently in one of the states. Similarly, under the proposed Kenya definition, a foreigner who settles in Nigeria with an intention of Making Nigeria his permanent home but who contemplates leaving the country if his new business ceases to be a going concern, will still not be domiciled in any of the Nigerian states if, after six years' residence in the Lagos state, he is still undecided whether such permanent home should be fixed in the Lagos state or in the Western state where his business is located.[59] The fact that section 8(2) of the Kenyan Draft Bill, if adopted in Nigeria, provides that a person may intent to make a country his permanent home even though he contemplates leaving it should circumstances change, does not help since the operation of the sub-section is conditional on his having decided to establish such permanent home in a legal district in Nigeria and not in the federation as a whole. Whereas such a person would most likely be held to have acquired a domicile of choice in Kenya.

59. Except for purposes of jurisdiction in matrimonial causes if a National domicile is subsequently adopted. This point will be fully considered in Chapter 4.

Moreover, for interstate conflicts, it is likely that the term "permanent home" will still be equated with the traditional home despite section 8(2) as a result of the reasons given above. Until the time when a Nigerian person will rid himself of such concepts as "Family-home", "Family-property", "Family-Council" and "Family-headship" - all of which at present are energising factors rigorously attaching him to his ethnic origin - it is submitted that a definition of domicile which insists on the intention to reside permanently, or to establish a permanent home, away from his traditional attachment before he can acquire a domicile of choice has no hope of success in the Nigerian setting.

It may be interjected, however, that some proposals contained in the English Code of Domicile, the Canadian Draft Domicile Act, and the Kenya Bill[60] may be usefully employed in the Nigerian private international law. These relate to the presumptions for ascertaining the domicile of choice and the fundamental change proposed in the three recommendations that the domicile of a person should continue until he acquires another domicile.[61] So also are the principles giving a separate domicile to a wife in certain circumstances or those governing the domicile of a married infant, an adopted child and a mentally incompetent person.[62] (These principles will be incorporated

60. For the full provisions of these three Model Acts, see Appendices A, B, and C, at the end of this work.

61. See Art.1 s.5 of the Lord Chancellor's Private International Law Committee's Code of the Law of Domicile; s.4 (4) of the Canadian Draft Model Act, and s.10 (2) of the Kenya Draft Bill on Law of Domicil.

62. Art.5, Code of the Law of Domicile (England); s.6 of the Canadian Draft, and s.6 of Kenya Draft Bill. This Bill does not contain any provision for ascertaining the domicile of a mentally incompetent person neither does it allow a married male infant to acquire a separate domicile. Similarly silent about the ability of a married male infant to acquire an independent domicile in the Canadian Draft Model Act.

in our conclusion at the end of this Chapter.)

6. THE DRAFT FAMILY CODE OF ISRAEL.

The difficulties inherent in the common law concept of domicile appear to have been overcome by the Israel Draft Family Code, not by substituting for the concept of nationality which previously existed in the country as the basis of personal law, with that of domicile, coupled with a greater or less degree of animus manendi, but by redefining the concept of domicile. Thus, para.28 of the Draft Family Code provides that "A person's domicile is the place which is the centre of his life". Para.31 goes on to say that "When a person's domicile is unknown, his residence is deemed to be his domicile".[63] The intention of the drafters of the Code is to provide a new definition which will "create a legal concept that should indicate the basic legal connection of a particular person at a particular time to a particular place."[64] It is immediately observed that only one factual connection, the objective factor is given prominence in the new definition. The intention of a person which plays an important role in the common law conception is not more than one of the factors which a court in Israel will take into consideration in determining where a person's domicile, as defined under the Code, should be located. Indeed, the comment on paragraph 28 of the Code states that intention "is not independent factor strong enough to take the place of other factors..... nor is it an additional requirement (as in England)".[65] As pointed out by Inglis,

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63. Para.30 of the Code states that "An individual's residence is the place where he resides, either permanently or temporarily".

64. Draft Family Code for the State of Israel, 1955; Harvard-Brandeis Translation, p.25.

65. Ibid., at p.27.

> "the principal value of the sections of the Israeli Draft Family Code dealing with domicil is in the fact that they may be regarded, to a certain extent, as a synthesis of the best of the concepts applied in this matter by a wide variety of Western countries. The language of the sections is simple, direct, and brief: so simple, direct, and brief, in fact that it will probably allow for a considerable degree of judicial latitude". [66]

In other words, one big advantage in favour of paragraph 28 of the Code is its flexibility and its capability of being manipulated to serve different situations.

The adoption of such a broad definition of domicile in a Federation, it is submitted, will provide for an easy change of domicile from one subdivision of the country to the other.[67] In Nigeria, especially for interstate conflicts, it will cease to be of any relevance whether a person has irrevocably severed the link between him and his ancestral home before he can acquire a domicile of choice. Domicile for purposes of interstate conflicts will not be more than the place where a person habitually resides with his wife (or wives) and minor children. The fact that he has his "family home" or other members of his immediate or extended family in another part of the country will not prevent him from regulating matters of his personal rights in which domicile is relevant according to the legal system of the place with which he has a real attachment.

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66. B.D. Inglis: "Reform in the Private International Law of Divorce, A Comparative Study of two recent Draft Codes" in 4, McGill Law Journal, p.42 at pp.47-48.

67. The Israeli definition appears to have been adopted in the American law. For while Para.11 of the Restatement (1967 Proposed Official Draft) defines domicile as "the place, usually a person's home, to which the rules of Conflict of Laws sometimes accord determinative significance because of the person's identification with that place" it proceeds to define a Person's home at Para.12 as "the place where a person dwells and which is the centre of his domestic, social and civil life" in substitution for the previous definition of "Home" contained in para.13 of the 1954 second Restatement. That para. read as follows: " A home is a dwelling place of a person, distinguished from other dwelling places of that person by that intimacy of the relation between the person and the place".

On the other hand, a broad definition as contained in the Draft Family Code of Israel, if adopted in Nigeria, will enable the judges to insist on clear evidence of intention to stay for an unlimited time, or "as long as circumstances permit"[68] as one of the factors to be taken into consideration in deciding objectively whether a person has acquired a domicile of choice at the international plane. In other words, this broad definition of domicile as a person's centre of life will enable the courts to distinguish between acquisition of a new domicile in another Nigerian state and in a foreign country; this they seem unable to do at present, yet this proposition has been firmly established in other federations, for example, the Commonwealth of Australia[69] and the Dominion of Canada.[70]

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68. Graveson, Conflict of Laws (6th ed.) p.207; cf. s. 8 (2) of the Kenya Draft Bill on the Law of Domicile.

69. See e.g. Union Trustee Co. of Australia Ltd. v. Commissioner of Stamp Duties [1926], Queensland S.R.304; Carey v. Carey [1942], South Australian S.R.62; Bradford v. Bradford [1943], South Australian S.R. 123; Walton v. Walton [1948], Vict. L.R.487. In the last case, Barry, J., after referring to the English rule that there is a heavy burden of proof on a person seeking to establish a domicile of choice away from his domicile of origin, said that such rule could scareely obtain in a federation. He pointed out that "in Australian community, where social ideas and customs are substantially the same throughout the continent, and where there is a common nationality and a common language, the same significance or importance cannot be ascribed to a person's conduct in moving from one State to another as when the question arises in connection with the action of a person moving to a community where, by reason of a difference of language and national traditions, institutions and usages, he takes on the character of a foreigner". - at p.489. Even in Canada where there is no common language, the same principle is upheld as the following note will show.

70. See e.g. Baker v. Baker [1941] 2 W.W.R.389; Gunn v. Gunn (1956) 2 D.L.R. (2D) 351; Young v. Young [1960] 21 D.L.R. (2D) 616; Fedeluk v. Fedeluk [1968] 63 W.W.R.630. The last case concerned a divorce action in which the defendant husband had a domicile of origin in Manitoba. He came to Alberta in 1963 and resided there for a period of less than 5 years, before the commencement of the action. After staying in Alberta for 3 years he married the plaintiff wife who appeared to have an Alberta pre-marital domicile. In November of the same year he was sentenced to a term of imprisonment for a year which he completed in October, 1967. Three months after his release, the present action was commenced. The

/Footnote cont.....

Furthermore, since a definition which employs a person's centre of life as the criterion for determining his domicile of choice neither requires the intention of such a person to be an independent factor strong enough to displace other factors, nor a separate and independent element as under the existing law, it is submitted that such a simple definition of domicile will enable the courts in Nigeria to deal successfully with the perennial problem of ascertaining the domicile of a person who resides in Nigeria with an intention to stay but who has not decided in which particular state in the country he intends to settle permanently. Once it is clearly established that the propositus has a settle determination to settle in Nigeria, in the political sense, it will then be possible for the court to disregard his present intention as to which particular state he intends to reside permanently and employ other objective and factual data (as in other interstate situations) to determine the particular state with which he has a more enduring connection. Thus in our example above, the fact of his residence in the Lagos state for six years would provide a factual evidence that that state is the one in which he has the centre of his

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F/note 70 cont. from previous page.

evidence showed that at the time of the proceedings in December, 1967, he had obtained an employment in Alberta, and that he had no present intention of leaving Alberta but expressed the desire to go to the United States of America in about two years' time. The Supreme Court of Alberta stated that there are several authorities for the proposition that "much less will be required in the way of evidence of a man's intention to establish a new domicile where a man moves from one province of Canada to another than where a man moves from Canada to a foreign country". The court therefore held that a domicile of choice had been satisfactorily established in Alberta and that the defendant's desire to go to the U.S.A. in two years' time did not constitute an abandonment which could only take place by the concurrence of an intention to leave and the factum of departure from the province.

life. If he resides simultaneously, or has homes, in more than one state, we may usefully employ the presumption contained in the English and Canadian proposals which states in effect that a person having two homes in more than one legal territory should be presumed to have his domicile at the place where his spouse and children (if any) habitually reside. [71] In short, it is our view that by defining domicile as the country where a person has his centre of life and providing the courts with some presumptions to assist them, they will be able to arrive at a decision consonant not only with their idea of justice but equally in keeping with that of the common man in individual cases.

In addition, the definition of domicile on this modern line would seem to eliminate the fictions and technicalities observable in operating the revival doctrine of domicile of origin. Thus a person who has abandoned his former domicile but who has not settled in a new place,e.g. as a result of his death in transit will not necessarily have the domicile of origin as under the existing rules. His new domicile or his domicile at the time of death will depend on the circumstances of the situation. Prima facie, his previous domicile will continue as in the American law. But if he was moving from a foreign country where he had been domiciled to a place where he had traditional, family or religious attachment, any of these factors must have demonstrated that the place which may logically be regarded as his centre of life at the time of his death is the country to which he was moving.

Finally, as will be shown later in this work, the application of the law of domicile should not be the sole prerogative of the High and other types of "English" courts in Nigeria.

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71. See Art.2 of the Code of the Law of Domicile (England) and section 5 (2) (a) of the Canadian Draft Model Act.

Especially for interstate conflicts, the concept of domicile must play an important role as the connecting factor for jurisdictional and choice of law purposes in the customary courts. These courts will therefore need a definition easily understood and easily applied.

D. CONCLUSIONS.

The conclusions arrived at may be summarised in the form of the following short propositions. To these will be added some of the proposals found desirable for adoption in Nigeria in the recommendations contained in the English Code of Domicile, the Canadian Draft Domicile Act, and the Kenya Bill on Law of Domicile. These propositions are intended to be in substitution for the definition, and addition to the present rules, of domicile. It therefore becomes clear that they do not necessarily represent what the law is in Nigeria, but what we believe the law of domicile should contain in addition to the present rules.

1. The domicile of a person shall be in the country or legal district in which the person, together with his spouse and minor children, has the centre of his social, domestic and civil life.
2. Where a person dwells in a country or legal district, he shall rebuttably be presumed to have the centre of his life in such territory.
3. Where a person is stationed in a country or legal district for the principal purpose of carrying on a business, profession or occupation and his wife and children, if any, reside in another territory, he shall rebuttably be presumed to have his domicile in the territory in which his wife and children reside.

4. Subject to Rule 1, the domicile of a person shall continue until it is proved that he has acquired another domicile.

5. The domicile of a married woman shall be that of her husband: Provided that for the purpose of jurisdiction in matrimonial causes, a wife who is living separate and apart from her husband shall be entitled to acquire an independent domicile of her own.[72]

6. On the dissolution of a marriage, the domicile of an infant child of the parties shall be that of the person in whom the custody of the infant is lawfully vested by the order of a competent court, or if it is vested in more than one person, that of the person with whom it lives.

7. The domicile of a lawfully adopted child shall be that of the adopter: Provided that in the case of joint adoption by spouses, the adopted child shall take the domicile of the male adopter.

8. The domicile of a child legitimated by the subsequent inter-marriage of its parents, or by the acknowledgment of its paternity by its putative father, shall be that of the father. Such dependent domicile shall be operative from the date the act of legitimation takes effect.

9. The domicile of a posthumous child shall be that of the mother: provided that if the custody of the child has been awarded to a member of the deceased father's family, by a court of competent jurisdiction in the country or legal district in which the father was domiciled at the time of his death, the child's domicile shall be that of such family member. (It is submitted

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72. See the Postscript for the present position of the law.

that this proviso will cater for the rule of customary law by which the legal custody of the deceased minor child may, occasionally, be awarded to a member of the family group of the deceased, if it is in the interest and welfare of the child that such an order should be made.)

10. An infant shall have capacity to acquire an independent domicile of choice:

(a) If he is validly married; or

(b) If he is emancipated; or

(c) With the approval of the court of the country or legal district in which he resides, if he has been abandoned by the person on whom his domicile depends.

11. A lunatic, or a mentally incompetent person, shall retain, during his lunacy, the domicile which he had immediately before the period of his lunacy: Provided that the person or authority in charge of the lunatic may, to his benefit, change his domicile with the approval of the court of the country or legal district in which he is domiciled. Where the lunatic or the mentally incompetent person is the head of a family unit, a subsequent change of his domicile by the person or authority in charge of him shall not affect the domiciles of his wife and minor child; the domiciles of such dependent persons, during the lunacy of the person on whom they depend, shall be determined as if the lunatic were dead.

Finally, since the rules of private international law are part of the domestic law of each state, it must be pointed out that legislation incorporating these rules will have to be passed

either by each state, or preferably, by the Federal Government under an authority conferred on it by all the states. Such legislation should contain the following definition of terms: that an "emancipated" infant is an infant who no longer depends on any of his parents for his custody, maintenance and education; and that the word "marriage", "husband" or "wife" includes a marriage, husband or wife under Moslem law or Customary law.

CHAPTER THREE

MARRIAGE

A. THE DOMESTIC CONCEPTION OF MARRIAGE

Marriage is a conception which partakes of different forms under the Nigerian municipal law.[1] Though one basic institution, the employment of a particular form of ceremony rather than the other for the creation of the marriage determines the incidents appertaining to the status thus created. It will therefore be necessary to attempt a short description of the various forms under the municipal law before a discussion about their conflictual aspects at the interstate and international levels is embarked upon.

The first, which is often described as a "Statutory", "Christian" or "monogamous" marriage is conceived of as a consensual "union of one man and one woman to the exclusion of all others during the continuance of the marriage".[2] But despite the suggestion offered by one of these appellations, it has no religious significance.[3] Whatever the religious beliefs of the parties thereto, it can be validly celebrated by anybody within the country. Its chief distinguishing characteristics from the other forms of marriages in Nigeria

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1. See the Constitution of the Federal Republic of Nigeria, 1963, Schedule Part I, Item 23.
2. Interpretation Act 1964, (No.1 of 1964) S.18.
3. Obieke v. Obieke (Unreported) E/2D/62.

are that it is brought into being through the intervention of a state official and by well-defined and easily ascertainable body of formalistic rules.

The second, the Moslem marriage possesses a common factor with the third, i.e. the customary marriage, in that both are potentially polygamous at their inception. In other words, a Moslem or customary marriage is one which facilitates a possible union of one man with another woman during the continuance of a prior marriage. Before a subsequent marriage is entered into between the man and another woman, the existing marriage remains in fact monogamous although potentially polygamous. When a subsequent marriage between the man and another woman is contracted, then the marriage becomes a multiple one and the man is actually polygamously married. Each of them can also be easily converted into a monogamous or statutory marriage provided it remains potentially polygamous at the time of conversion.[4] The Moslem marriage can be distinguished from a purely customary marriage in that it was, and still is, in some territories in Nigeria, a religious institution the simple rules relating to the formation of which have, however, been greatly modified or completely superseded by rules of customary law in certain respects.[5] Nevertheless, in those places in Nigeria in which the Moslem religion is still dominant, the

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4. The Marriage Act, s.33.

5. See Anderson, Islamic Law in Africa, pp.171-2; Ahmadu Suka, Journal of the Centre of Islamic Studies, (Ahmadu Bello Univ.) No.1 at p.12.

Moslem marriage still retains some of its inbuilt religious characteristics e.g. the rule relating to the "criteria of equality of marriage" whereby a husband is required to be the equal of his wife as regards religion, profession, trade, race etc.[6] Furthermore, under the Moslem marriage, a man has the legal right to have up to four plural wives at a time.

The third type of marriage, i.e. the customary marriage, is a peculiarly indigenous institution. The rules for its formation and termination, though possessing some general characteristics vary as to details according to the diversity of the systems of customary law within the country. The creation is also attended by long-winded ceremonies. To discover which of these ceremonial aspects have a legal significance is not unattended with some controversial problems. This was well appreciated by the old Supreme Court of Lagos in Re Sapara[7] where Osborne, C.J. observed that there is

> "difficulty in distinguishing its legal and physical aspects, and between the legal essentials of the ceremony as opposed to its concomitant and social factors."

Its general distinguishing feature from a Moslem marriage, besides the religious nature of the latter, is that there is no limit to the number of wives a man may have at one time.

But as polygamy is an institution which has various forms, it will be necessary to point out that the only form of polygamy permitted under both the Moslem and Customary laws is the union of one man with one woman concurrently with two or more women under separate contracts of marriage. It therefore does

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6. See below.

7. (1911), Ren.G.C.Rep. 605 at p.607.

not include, e.g., a polyandrous marriage whereby two or more brothers (the fraternal polyandry) or several unrelated men (the indefinite type) may have one or more wives in common. The apparent inequality between man and woman in this respect is poignantly illustrated by such provisions of recorded customary law as that of the Borgu Native Authority which prescribes that

> "There shall be no statutory limit to the number of wives a man may have at one time. It shall be an offence for a woman to have more than one husband at one time." 8

Of significance to Nigerian private international law, however, is that the parties to each of the form of marriage discussed above are clothed under the law with the status of husband and wife.

In view of the manifold kinds of union permitted by law in Nigeria, to speak of a uniform set of rules of private international law applicable to them all will be wishful thinking. Also, as a result of the difference between the municipal laws of marriage and that of England, the conflict rules of which were introduced as part of the Nigerian law, it cannot be expected that the received conflict rules will be adequate, without modifications, to deal with the plethora of problems bound to arise in the Nigerian private international law of husband and wife. Of course, some of the English rules e.g. as to the recognition of polygamous marriages, as we have already observed, will have to be discarded as being unsuitable to the Nigerian social context. For as pointed out by

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8. Native Authority (Declaration of Borgu Native Marriage Law and Custom) Order, N.A.L.N. 52 of 1961.

Wolff,[9] the rules relative to the conclusion, the conditions and the termination of marriage are so closely connected with morality, religion and the fundamental principles of life prevailing in a given society that their application is often regarded as a matter of public policy. It follows, he concluded, that the creation of harmony of laws which is the ultimate objective of private international law is more difficult to achieve in the field of marriage and divorce than in any other branch of the law.

Our main concern will be to consider the conflicts problems involved in this field of law. Some solutions suggested by the received common law rules, and the rules provided by Nigerian statutes on this point, will also be examined with a view to making some suggestions for modification where necessary. For this purpose, the three-fold conception of marriage will be classified into (a) Monogamous marriage (denoting a marriage contracted under the statute) and (b) Polygamous marriage (implying a marriage contracted either under the Moslem law or Customary law). Our attention in this respect will be directed to the choice of law rules regarding the following aspects of such marriages, both at the intranational and international conflicts:

1. What law determines the initial character of a marriage;
2. What law governs the incidents of marriage;
3. What law(s) governs the formal and the essential validity of marriage.

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9. Martin Wolff, Private International law, (2nd ed.) p.313.

B. CHOICE OF LAW

1. WHAT LAW DETERMINES THE INITIAL CHARACTER OF A MARRIAGE

We have just seen that both monogamy and polygamy are features of the marital law in Nigeria and that the law gives to every Nigerian person the right to choose the system of law, whether Customary, Moslem or Statutory, with reference to which he will contract his marriage. Another basic point that should be borne in mind is that just as mutation of marriage is recognised to a limited extent under the domestic law, so also is the initial character of a marriage not indelible under the Nigerian private international law. The rule of mutation of marriage in Nigerian private international law would seem to have been based on the recognition of the fact that the law on marriage is not the same in the legal systems all the world over, and that justice to the parties make it incumbent on the Nigerian courts to adopt such a solution.[10] Therefore, before it can be ascertained whether a foreign marriage has changed its initial character at the time of the proceedings, it will be necessary to know what this initial potentiality was.

The term "initial character", rather than "the nature", of a marriage is used to discuss what system of law determines whether the form of ceremony employed by the parties to celebrate their marriage is the one appropriate for the formation of a monogamous marriage or a polygamous one. In this respect, we differ from most writers on private international law in

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10. The principle of mutation of marriage will be discussed fully below.

the common law world who employ the words "nature of marriage" to denote the original character of a marriage as well as what consequences flow from such a marriage, either at its inception or thereafter.[11] In our view, to talk about the nature of a marriage in this sense is to confuse the issues of the form of the contract, which merely operates as the vehicle on which the status of marriage is predicated, with the incidents or consequences of such status. There is a fundamental problem of classification as to whether a question relates to form, i.e. proper rites; or whether it concerns, e.g. the capacity of a person to take a wife at all, or to take additional wife. The former only goes to the essence of the contract of marriage, whereas the latter, according to Nigerian conflicts rules, is a question of incident of status of marriage,[12] just as other normal incidents of marriage as the right of one party to be called a spouse, widow or widower of the other; the spouses' right of co-habitation, or the marital property interests which one spouse has in the other's assets. The regulation of these matters of incident may be ascribed to the lex loci celebrationis or the personal law, according to the conflict methodology, based on the social policy, of the individual system of law. The applicable law governing such matters in Nigerian private international law will be considered shortly.

But as regards the solution of the problem, which law determines the monogamous or polygamous potentiality of a

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11. See e.g. Dicey and Morris, op.cit., 8th ed. p.276.

12. Asiata v. Goncallo (1900) 1 N.L.R. 42.

marriage at its inception, there is fundamental agreement by almost all systems of private international law that there is no other law applicable besides the lex loci celebrationis. This is also true of the Nigerian system. Indeed, a statutory recognition of this principle is observed in section 18 of the Interpretation Act[13] which defines a monogamous marriage as

> "a marriage which is recognised by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage".

In similar terms is section 2 of the Legitimacy Act[14] which provides that a Christian marriage is one

> "which is recognised by the law of the place where it is contracted as the voluntary union for life of one man and one woman to the exclusion of all others".

It becomes apparent from these provisions that the Nigerian courts need to look at the lex loci celebrationis in determining the initial character of a marriage. These definitions do not, however, condition them to determine the consequences or incidents of such marriage by the lex loci. This is because the sections both speak of a valid menogamous marriage as one recognised as such by the law of the place where it was contracted, thereby making it possible for the courts to re-classify such foreign monogamous marriage in appropriate situations. The question therefore arises as to which law decides the incidents of a marriage, particularly the right of the husband to take an additional wife.

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13. (Fed.) No. 1 of 1964.

14. See Legitimacy Act, Cap.103 (Fed.); and also the Legitimacy Laws, Cap. 75, East, 1963 ed.; Cap. 63, Northern, 1963 ed.; and Cap. 62, West, (1959 ed.).

2. LAW GOVERNING THE INCIDENTS OF MARRIAGE

It may be asked, as a preliminary enquiry, why it is necessary for the Nigerian private international law to contain a choice of law rule for determining the incidents of a marriage since both monogamy and polygamy are permitted under the law. A short answer to this question lies in the fact that though monogamy and polygamy are regarded as different forms of one basic institution of marriage, the rights accruing to the parties or third parties are different according to whether the marriage is monogamous or polygamous. First, we have noticed the basic difference that the husband in a monogamous marriage has no right to take another wife during the subsistence of the marriage whereas the husband in a polygamous marriage has. But this is not all. As a general rule, the monogamous or polygamous character of a marriage, whether in its original form or in its converted form, determines which, out of the two hierarchy of courts in Nigeria (i.e. the Customary or the English-type courts) has original jurisdiction to adjudicate on the marriage. The monogamous or polygamous character of the marriage also determines, after its dissolution, the nature of the financial obligations of the parties. Finally, the rights of third parties, e.g. succession rights, differ radically according to whether the marriage of the deceased was monogamous or polygamous. These examples, the list of which is not exhaustive, clearly show that the ascertainment of the law which determines the incidents of a marriage must have great significance in this body of law.

The problem arises in its acute form if parties who are

subject to a system of law permitting polygamy perform their marriage in a manner designed for monogamous marriages in a country where only monogamous marriages are permitted.[15] In such situation, is it competent for the Nigerian courts, regardless of the monogamous form used, to give effect to such marriage but only as a polygamous marriage in accordance with the personal law of the parties? Of if a person, who was already polygamously married, left his wife behind in Nigeria and contracted a subsequent monogamous marriage abroad with another woman whose personal law may or may not permit plurality of wives, what is the effect of the second marriage?[16] Or further, if parties who are domiciled in a Nigerian state, where they contracted a polygamous marriage, go through a form of monogamous marriage in a Christian country merely for the purpose of obtaining a marriage certificate to facilitate the proof of the existing marriage,[17] does the polygamous marriage become converted into a monogamous one or does it remain polygamous? By reference to the law of which country should the question be answered? Should there be a difference of solution according to whether monogamy and polygamy are both permitted in the foreign country or whether only monogamy is allowed in such place?

It is interesting to observe that a good effect of

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15. As occurred in Asiata v. Goncallo (1900) 1 N.L.R. 42.

16. This was the question posed in Adegbola v. Folaranmi (1921) 3 N.L.R. 89.

17. As occurred in Ohochuku v. Ohochuku [1960] 1 W.L.R. 183.

slavery on the development of conflicts rules in Nigeria is that it has afforded the Nigerian courts the opportunities to consider this problem. But since the solutions provided by the two decisions on this point are inconsistent, it will be necessary to consider juristic views on the matter with a view to determining which of these inconsistent decisions is right.

The determination of the appropriate law which governs the incidents of a marriage has, for a long time, hung on the question whether or not monogamy and polygamy are various forms of the same institution, and consequently, whether or not it is possible, despite the form employed to contract a marriage, for the incidents of monogamy to be substituted for polygamy, and vice versa, according to any mutation in the personal law of the parties to the marriage. The two propositions on this point were well put by Beckett[18] when he wrote that the first view that the lex loci celebrationis governs the incidents of a marriage is based on the assumption that a

> "polygamous marriage, though it shares the name marriage and has many results and incidents in common with monogamous marriage, is an essentially different institution, so different that it is necessary to have regard to the actual ceremony and the lex loci contratus, not merely to ascertain whether there was a marriage",

but also what the incidents of the marriage are.[19] The alternative view, he continued,

> "proceeds on the assumption that there is one institution - 'marriage' - which includes monogamous and polygamous marriage. The lex loci contractus only governs the form of the marriage. ... The 'incidents' ... are governed by the personal law of the parties, and the right or

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18. "The Recognition of Polygamous Marriages Under English Law", 48 M.L.R. 341 at pp.352 and 356.

19. Ibid., at p.356.

> capacity of the husband to take a second wife is one of such incidents or essentials and depends on his personal law". 20

Consistently with the idea that monogamy and polygamy are essentially different institutions, the preponderant opinion of learned writers on English law[21] takes it as well established that the lex loci celebrationis immutably fixes the incidents of a marriage for life. Consequently, if a person who is subject to a personal law which permits polygamy marries in England in a registry office, he contracts for life a monogamous marriage and looses his right to take a second wife. The fact that he has never acquired an English domicile is immaterial. On the other hand, if an English domiciliary goes through a polygamous marriage in Nigeria where polygamy is permitted, it has been suggested, on the authority of Re Bethell[22] that the marriage is not only polygamous but invalid,[23] notwithstanding the fact that he never takes more than one wife during his life time. In support of this contention is often cited a host of English decisions[24]

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20. "The Recognition of Polygamous Marriages Under English Law", 48 M.L.R. 341 at p.352.

21. Dicey and Morris, op.cit., 8th ed. p.276; Westlake, A Treatise on Private International Law, 7th ed. p.69; Wolff, op.cit., pp.318-319; Beckett, ibid. p.356; Morris, "Recognition of Polygamous Marriages in English Law", 66 Harv. L.R. (1953) 961 at p.976; Sinclair, "Polygamous Marriages in English Law", 31 B.Y.B.I.L. (1954) 248 at p.249; Tolstoy, "The Conversion of a Polygamous Union into a Monogamous Marriage", 17 I.C.L.Q. (1968) 721 at p.725; Eekelaar, "The Dissolution of Initially Polygamous Marriages", 15 I.C.L.Q. (1966) 1181 at pp.1183-1184.

22. (1887) 38 Ch.D.220. There was no finding as to the domicile of the Englishman who married an African woman according to polygamous rites in Botswana.

23. Dicey and Morris, op.cit., 8th ed. p.283.

24. Chetti v. Chetti [1909] P.67; R. v. Hammersmith Marriage Registrar [1917] 1 K.B. 634; R. v. Naguib [1917] 1 K.B.359;

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a recent analysis of which[25] seems to have led to the agreement, at least by some of the leading writers on English private international law,[26] that these cases are not good authorities for the proposition that the lex loci celebrationis is the appropriate law for determining the incidents of a marriage.

It must be pointed out, before leaving this point, that few exponents of the lex loci rule are now happy to see a slight modification of the rule for certain purposes. For instance, Dr. Morris[27] welcomes a reversal of the rule in Hyde v. Hyde[28] in the recent case of Ali v. Ali.[29] In the latter case it was held that an English court could assume jurisdiction to dissolve a marriage which was potentially polygamous at its inception, on the basis that by the time the husband instituted divorce proceedings on it in England, the marriage had become converted into a monogamous one by the

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24. (continued)
Srini Vasan v. Srini Vasan [1946] P.67; Baindail v. Baindail [1946] P.122; Maher v. Maher [1951] P.342; and surprisingly, Russ v. Russ [1964] p.315 which tends to support the view that the personal law governs the incidents of a marriage.

25. By Bartholomew, in 13 I.C.L.Q. 1022 at pp.1050-1058.

26. See Cheshire, op.cit., 7th ed. p.266; Graveson, op.cit., 6th ed. p.261.

27. In 17 I.C.L.Q. (1968) at pp.1014-1015.

28. (1866) L.R. 1 P. & D. 130.

29. [1966] 2 W.L.R. 620.

subsequent acquisition of a new domicile by the parties in England. But while welcoming the decision in this case Dr. Morris is still of the opinion that, though logical, it would not make sense to hold that the incidents of a marriage contracted in England according to monogamous rites should be governed by any other law besides English, even

> "if the parties acquire or resume a domicile in some country where the law permits polygamy". 30

There is no doubt that what is still dominant in the minds of these writers is the thought that if the proposition is accepted that the personal law governs the incidents of a marriage,

> "the effect would be to deny English matrimonial relief to English girls marrying Mohammedans in monogamous form in England". 31

Now that the Law Commission in England is in the process of making proposals for the abolition of the jurisdictional[32] as well as other[33] limitations on the recognition in England of foreign polygamous marriages, such proposals, if accepted, will deny the proposition that the lex loci celebrationis governs the incidents of a marriage any foundation in logic and in reason.

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30. 17 I.C.L.Q. (1968) p. 1015.

31. Dicey and Morris, op.cit., 8th ed., p.277.

32. See the Law Commission's Working Paper No.21 of 26/7/68, entitled "Polygamous Marriages" Para.53. It is significant to observe that this Working Paper was prepared by Dr. Morris, the general editor of the current edition of Dicey and Morris.

33. Third Annual Report of the Law Commission, 1967/1968 (No.15) Para.55.

That notwithstanding, the number of writers who are not prepared to allow chauvinistic considerations to affect the solution of a problem of international dimensions is on the increase. It is Professor Cheshire who first attacks the view that the lex loci celebrationis should be applied to determine the incidents of a marriage. In his opinion, such a solution

> "is a flagrant contradiction of the fundamental principle that matters of status of husband and wife, are regulated solely by the law of domicile. The operation of this principle cannot be disturbed merely because English ceremonials of marriage are available to those whose personal law recognises polygamy. Marriage is a universal institution that includes inter alia both monogamous and polygamous unions. These are not divergent conceptions, but are variant forms of the same genus and they each create the status of husband and wife". 34

His submission, in view of this argument, is that the appropriate law by which to determine whether a husband has capacity to take a second wife is the law of the matrimonial domicile.

In view of Professor Graveson's acceptance of the proposition that the initial character of a Christian marriage "may be changed by the person concerned changing his own domicile",[35] the caveat against the following view seems to have been removed in respect of the law which governs the incidents of a marriage:

> "incidents of status which are or may be exercised to effect a transaction, such as marriage or adoption, on which a change of status itself may be predicated, are governed by the same law as that governing the status of which the particular incident forms part, that is, in domestic status, generally the law of domicile". 36

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34. Cheshire, op.cit., 7th ed. p.267.

35. Graveson, op.cit., 6th ed., p.253.

36. Graveson, op.cit., 6th ed., p.242; and also pp.260-261.

This appears a volte-face on the part of Professor Graveson in relation to the exclusive application of the lex loci celebrationis,[37] as a result of recent English decisions.[38]

To conclude a consideration of the juristic view as regards the law governing the incidents of a marriage, the opinion of Professor Bartholomew must be stated. He said:

> "The function of the lex loci celebrationis in relation to marriage is the determination of the form of the ceremony. The rights and duties of the parties as married persons adhere to status, and it is surely a firmly established rule of Private International Law that status is determined by the lex domicilii of the parties concerned, and therefore it would seem logically to follow that the existence of husband's right to take an additional wife if he so desires should be determined by the husband's lex domicilii". 39

The Position under the Nigerian Law

It is axiomatic that the view accepted in Nigeria is that whatever its form, the aspects of social life which a marriage is designed to regulate, and the status emanating therefrom, are the same.[40] Indeed the Federal Republican Constitution speaks of marriages as including those contracted "under Moslem

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37. See Graveson, op.cit., 4th ed. p.134.

38. e.g. Att.-Gen. of Ceylon v. Reid [1965] A.C. 720; Cheni v. Cheni [1965] P.85 at p.90 where it was remarked by Sir Jocelyn Simon P. that "there are no marriages which are not potentially polygamous in the sense that they may be rendered so by a change of domicile and religion on the part of the spouses"; Ali v. Ali [1966] 2 W.L.R. 620.

39. Bartholomew, "Polygamous Marriages" 15 M.L.R. (1952) 35 at p.41.

40. Cf. Kasunmu and Salacuse, op.cit., pp.71-72.

law or other Customary law".[41] It is therefore least surprising that right from the coming into effect of the political entity known as "Nigeria", mutation of marriage has been accepted as a concept of the Nigerian marital law[42] as well as a rule of private international law. Consequently, it would seem that the personal law of the husband at the time of the subsequent marriage ceremony governs the incidents of the earlier marriage, including the question of its mutation.

An answer to the question as to which law governs the incidents of a marriage was first attempted in 1900 in the case of Asiata v. Goncallo.[43] As will presently be shown, it is beyond doubt that the decision of the Supreme Court of Lagos was based on the view now current that the personal law of the parties at the relevant time has the most significant part to play in the determination of the husband's right to take another wife. In that case, Alli Elese, a Nigerian of

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41. Item 23, Schedule Part I, The Constitution of the Federal Republic of Nigeria, 1963. See also, s.35 of the Marriage Act.

42. For the limited circumstances under which a marriage can alter its initial character under the domestic law, see s.35 of the Marriage Ordinance, 1884, (No.14 of 1884), now re-placed by s.33 of the Marriage Act, Cap.115, Laws of the Fed. of Nigeria, 1958 ed. There, as we have indicated above, a marriage which is potentially (but not actually) polygamous may be converted into a monogamous one subsequently. But as the case of R. v. Princewell (1963) N.N.L.R. 54 has shown, the Nigerian domestic law is yet to accept the Ceylonese rule, recently established by the Privy Council in Att.-Gen. of Ceylon v. Reid [1965] A.C. 720, that in a country with different forms of marriage, based on diverse systems of law, a change of faith which implies a change also of personal law on the part of the husband, should affect his capacity to take an additional wife.

43. (1900) 1 N.L.R. 42.

the Yoruba tribe, was taken as a slave to Brazil. There he married Selia, an African freed woman-slave, first, in accordance with Mohammedan rites and later, by a Christian ceremony at a church. Two daughters were born of the marriage. Later the husband returned to Lagos with the wife, leaving the two daughters behind in Brazil. In 1863, the first two Ordinances[44] on monogamous marriages were passed. These were replaced in 1884 by the more comprehensive Marriage Ordinance, which, in addition to providing detailed rules for the celebration, and the general effects, of monogamous marriages, retrospectively validated some "Christian" (i.e. church) marriages already contracted in the Colony as a result of the evangelical activities of the missionaries. Then section 37 of the Ordinance provided:

> "Any person who is married under this Ordinance, or whose marriage before the commencement of this Ordinance is declared by this Ordinance to be valid, shall be incapable during the continuance of such marriage of contracting a valid marriage under any native law or custom".

Subsequent to the passing of the 1884 Ordinance, Alli contracted in Nigeria a second marriage with a Nigerian woman, Asatu, in accordance with Moslem law. The wife of the Brazilian monogamous marriage was still living. By Asatu he

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44. The first Ord., No. 10 of 1863, came into effect on 1st July 1863, and was entitled "An Ordinance to provide for the granting of Licenses for Marriage in the Settlement of Lagos and its Dependencies". The Second, The Registration Ordinance, No. 21 of 1863, merely authorised the establishment of a procedure for the registration of Births, Marriages and Deaths. There was no express provision as to whether the marriages in respect of which the Governor was to grant Licenses and which were to be registered should be exclusively monogamous or "Christian" in character. But this could not have been in doubt since it is inconceivable that the Governor would have been authorised to deal with polygamous (tribal marriages) a year after colonization of Lagos.

had one child, the plaintiff in the present case, who claimed to be entitled with the two daughters of the first marriage in succession to their deceased father's estate.

Since the first monogamous marriage was not contracted in Nigeria and was not one of the marriages validated under the Ordinance, the court was rightly of the view that the first question to be decided was whether the Mohammedan marriage contracted in Lagos was legal so as to determine whether the issue of the marriage was legitimate or not. This, in turn raised the question whether the Brazilian monogamous marriage was mutable so as to enable the husband to take an additional wife, and if so, which law governs its mutability.

In the Divisional Court, Rayner, C.J. simply held that the second marriage contracted in Nigeria was invalid. But on appeal, the Supreme Court reversed and held that the second marriage was a valid Mohammedan marriage. As regards which law governs the mutability of the marriage celebrated according to Christian rites in Brazil, it will be instructive to quote at length some extracts of the judgment given by each of the Supreme Court judges. According to Griffith, J.,

> "There can be no doubt that the Christian marriage between Alli and Selia was legal, and in Brazil all the legal incidents of marriage would have attached to such a marriage. There undoubtedly Alli could not legally marry another woman while Selia remained his wife. Nor could he, while Selia was his wife, have legally married any other woman in any other Christian country. But this is not a Christian country, and by native law (including the Mohammedan law) a man can legally have several wives. Such polygamous unions would not of course be recognised in Christian Countries, but here they are of everyday recognition. It is clear from the evidence that Alli was a <u>bona fide</u> follower of the prophet, and as such was legally entitled to marry several wives. In such circumstances why should his previous Christian

> marriage render illegal his subsequent marriage by Mohammedan rites. Suppose a Turk in England marries a Turkish lady by Christian rites, would that render illegal in Turkey a subsequent marriage by Mohammedan rites? I should think not. The case before us is stronger, as the parties to it were ex-slaves dragged against their will to a Christian country, whilst to make it clear that they were not altogether satisfied with the Christian ceremony, they first went through the form of a Mohammedan marriage. For the purpose of this case, Lagos is as much a Mohammedan country as Turkey, and as we ought to apply the Mohammedan law in deciding as to the legality of this marriage, I am of the opinion that the marriage with Asatu was legal." 45

In his judgment, Griffith, J., did not forget the interest of the first wife. For he argued that it may be considered contrary to justice that Selia, having contracted for monogamy should be deprived of the incidents of that marriage. But it was clear, he said, that the contract which a Christian marriage would ordinarily imply was clearly not implied in the case under consideration as Selia not only went through the Mohammedan ceremony first, but did not appear to have raised the slightest objection to her husband's subsequent marriage with another woman; whilst after the husband's death she accepted the validity of the subsequent marriage by requiring the child of the marriage to make, together with her own daughters, a joint conveyance of the husband's property.

In a concurring judgment Speed, C.J., was more succint. He said:

> "I do not admit that the parties in this case contracted a Christian marriage at all. They

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45. (1900) 1 N.L.R. 42 at pp. 43-44.

> were Mohammedans, and they merely for local reasons went through the marriage in Christian form". [46]

In other words, that the Brazilian marriage was a valid polygamous marriage which was celebrated in a monogamous form.

The territorial as well as the non-territorial connection which made the Lagos law the relevant one for the determination of the legal incidents of the monogamous marriage, including its mutation, was provided by the concurring judgment of Morgan, J., when he remarked that the husband and his plural wives "were all Mohammedan natives of this country having their domicile here".[47]

From these concurring judgments, it becomes clear that all the judges did not deny the fact that the marriage contracted by the parties in Brazil was one, to borrow the words of the Interpretation Act,

> "which is recognised by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage".

Nonetheless, the initial character of the marriage did not deter them from classifying the marriage as a polygamous one which enabled the husband to take another wife in Nigeria, according to his personal law.

In their comments on this case, Messrs Kasunmu and Salacuse state that "the judgment showed a lack of appreciation of the issues involved".[48] On the contrary, it must be submitted that these learned authors demonstrate by the above statement

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46. Asiata v. Goncallo (1900) 1 N.L.R. 42, at pp.43 to 44.

47. Ibid., p.45.

48. Kasunmu and Salacuse, op.cit., p.98.

a singularly naive idea of what the case was all about. Their analysis of the case was not only wrong: the reason ascribed for the decision is not borne out by the facts of the case. For example, they were of the opinion that the classification of the marriage celebrated in Brazil was not necessary to the decision since, according to them, the second marriage contracted in Nigeria would be valid whether or not the Brazilian marriage was monogamous or polygamous. This view was based on the erroneous assumption that the Nigerian Mohammedan marriage was celebrated before 1884 when the law

> "did not prevent one who was married monogamously from marrying another woman under customary law, nor was conversion of marriage known then". [49]

On the contrary, the judgment of Griffith J., made it plain that the Mohammedan marriage contracted in Nigeria took place "subsequent to the passing of the Marriage Ordinance, 1884",[50] when it became unlawful for a person who contracted a monogamous marriage under it to contract a subsequent marriage according to customary law. Moreover, it has been shown above that section 35 of the Ordinance was a provision on conversion of marriage.

Secondly, and more serious, these authors were of the view that the operative facts on which the judgments were based were as to whether a second monogamous ceremony solemnized in Brazil by the parties converted their first Mohammedan marriage, also contracted in the country, and what law decided the question of the conversion.[51] Whereas there is no room for doubt

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49. Kasunmu and Salacuse, op.cit., p.98.

50. Asiata v. Goncallo (1900) 1 N.L.R. 42 at p.43.

51. Kasunmu and Salacuse, ibid.

that the Mohammedan ceremony performed by the husband and his first wife in Brazil was regarded by all the judges as of no legal significance in Brazil since it was a Christian country. For example, Griffith J., prefaced his judgment with the following remarks:

> "The question here is whether a Christian marriage[52] between native Mohammedans in a country to which they were taken as slaves renders invalid a subsequent marriage here by the husband during the subsistence of the first marriage." 52

Then he wrote:

> "There can be no doubt that the Christian marriage between Alli and Selia was legal." 53

Thus regarding the Christian marriage as the first and the only legal one contracted in Brazil, he continued to associate the Christian marriage with legality not less than six other places in the two-page judgment which he gave in the case.

Speed, Ag. C.J., said:

> "I have seen and considered the judgment of my learned brother with which I entirely agreed".

Then, he too observed:

> "I do not admit that the parties in this case contracted a Christian marriage at all. They were Mohammedans, and they merely for local reasons, went through the marriage ceremony in Christian form." 54

Explained in other words, what the judge was saying was that he did not believe the parties wanted the incidents of monogamy to attach to a marriage, which to all intents and purposes, was meant to be polygamous and which, for want of a valid Mohammedan ceremony in Brazil, was celebrated in a monogamous form.[55]

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52. Emphasis supplied.

53. Asiata v. Goncallo (1900) 1 N.L.R. 42 at p. 43.

54. Ibid. at p. 43.

55. Contra. Salacuse, "Birth, Death and the Marriage Act: Some Problems in Conflict of Laws", in The Nigerian Law Journal, Vol.1, 59 at p.63. The learned author was of the view that Speed, Ag. C.J.'s opinion was a rejection of the one expressed by Griffith J.

Otherwise, Speed Ag. C.J. would not be agreeing entirely with the judgment of Griffith J. but fundamentally disagreeing with it.

The same observations may be made about the concurring judgment of Morgan, J.[56]

From this analysis of the case, it will be seen that Asiata v. Goncallo[57] cannot be an authority for the proposition as to which law determined the conversion of a customary marriage into a monogamous one, when all the circumstances justifying the conversion occurred in the same territorial district, as claimed by Messrs Kasunmu and Salacuse. Rather the case determines what law governs the mutation of a monogamous marriage when the parties thereto, subsequently acquire or resume a domicile in a country where polygamous marriage is permitted. The rationes decidendi of the case are not obscure as has been stated by Mr. Salacuse.[58] They are, (a) that mutation of a monogamous marriage by the subsequent acquisition or resumption of domicile in a country where polygamy is permitted is a rule of Nigerian private international law; (b) that the right of the husband to take an additional wife is an incident of marriage and (c) that such matter of incident is governed by the lex domicilii of the parties at the time of the second ceremony.

A slightly different situation to the one in Asiata v. Goncallo[59] occurred in Adegbola v. Folaranmi[60] twenty-one years later. In that case, a Nigerian, Harry Johnson, contracted in

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56. (1900) 1 N.L.R. 42 at p.45.
57. Ibid.
58. op.cit., p.63.
59. (1900) 1 N.L.R. 42.
60. (1921) 3 N.L.R. 89.

Nigeria, a valid marriage which was potentially polygamous with a Nigerian woman, Oniketan, according to customary law rites. The plaintiff was the legitimate child of the marriage. Thereafter, Johnson was taken as a slave to the West Indies where, during a stay of about 40 years, he contracted another marriage with Mary according to Christian rites. Three years after his marriage in Trinidad, Johnson returned to Nigeria with Mary and both established a matrimonial home in Lagos. In 1900, Johnson died intestate thereby leaving Mary to manage his properties. Mary herself died in 1918. By her will, she devised all the properties to the defendant. The plaintiff claimed as the legitimate child of the deceased to succeed to the intestate estate of Harry Johnson according to customary law.

Implicit in the whole issue was again the nature and the effect of the marriage celebrated according to Christian rites in Trinidad. If it was monogamous, then the succession fell to be governed by the general law; whereas if it was polygamous, customary law would apply. And preliminary to any question of classification was the one as to whether the marriage could ever have been valid in view of the subsistence of the potentially polygamous marriage of Harry Johnson. A full Supreme Court (comprising of different judges from those that decided Asiata's case) affirmed the decision of the Divisional Court and held that notwithstanding the non-production of a marriage certificate in respect of the Trinidadian marriage, it was a valid monogamous marriage which must be recognised as such in Nigeria. Faced with the uneasy task of holding that the monogamous marriage was validly contracted during the subsistence of a valid potentially polygamous marriage, the learned judges wriggled out

of the difficulty by presuming that at the time of the second marriage in Trinidad, Johnson must have thought that he and his customary law wife "were absolved from all obligations to [each] other" and that he was free to marry again. As it happened, and to the knowledge of all the judges, however, Oniketan was not only alive, both at the time of the second marriage and at the time of Johnson's return to Nigeria, but also continued to stay at the family home of the husband with the child of the customary law marriage, never taking another "husband". But on the presumption that the customary law marriage had been validly dissolved, the court bastardised the child of the valid polygamous marriage and held that he had no right to inherit his deceased father's estate. It is needless to state that this particular aspect of the decision had invited a lot of criticism.[61]

By classifying the marriage celebrated according to Christian rites in Trinidad as monogamous, there is no doubt that the judges must have proceeded on the following bases: (a) that the subsequent celebration of a monogamous marriage with another woman in Trinidad by Harry Johnson, during the subsistence of his potentially polygamous marriage, abrogated the status of husband and wife previously created between him and Oniketan by their Nigerian lex domicilii; (b) that the incidents of this foreign monogamous marriage were immutably and inescapably fixed by the form of celebration according to the lex loci celebrationis and that Harry Johnson's subsequent acquisition, or resumption, of domicile in Nigeria was irrelevant. It is also obvious that no reference was made to the

61. Coker, Family Property Among the Yorubas (2nd ed.) p.304; Obi, Modern Family Law in Southern Nigeria, p.183. As pointed out by Coker, intention alone is not sufficient to dissolve a marriage at customary law. "To dissolve a marriage, an act in law is necessary, however formal or trivial such act is".

decision in Asiata's case which constituted a binding authority on the court, if the doctrine of precedent had any value with the old Supreme Court. Adegbola v. Folaranmi[62] can, therefore, be criticised on the ground that it is difficult to reconcile with prior authority.

But apart from that, the question is, should the marriage have been classified as monogamous and with invalidating effect on the status of the child of the customary marriage? Harry Johnson, on his arrival in Nigeria, not only visited his customary law wife, but allowed the child of that marriage to visit him and Mary in Lagos.[63] Assuming that Mary was not aware of the previous marriage at the time of her marriage with Johnson in Trinidad, was she not conscious of the position three years later when she arrived in Lagos? Could her acquiescence for 24 years in the renewed association between Harry Johnson, his customary law wife, and the child of that marriage, not lead to the presumption that the Christian marriage was in fact intended to be polygamous? Had Nigeria ceased to be a "polygamous country" in 1921 as it was stated to be in Asiata v. Goncallo[64] in 1900? If we assume that Harry Johnson lost his Nigerian domicile as a result of his enforced residence as a slave in Trinidad, did he not resume it when he returned to Nigeria and lived there for 24 years prior to his death? A short answer to the inquiries is that Harry Johnson, having been found by the Supreme Court to have contracted a valid marriage which was

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62. (1921) 3 N.L.R. 89.

63. Ibid. at p.90.

64. (1900) 1 N.L.R. 42.

still subsisting at the time of the second marriage, had no capacity to contract any other valid marriage, except an actually polygamous one, whatever the form of the ceremony employed.

Even the courts of most European countries where polygamy is not permitted would not have reached, under their conflicts rules, the same decision as the one arrived at by the Supreme Court of Lagos in Adegbola v. Folaranmi,[65] had they been seised of the case. At worst, on the principle of universality of status, only the second marriage performed according to Christian rites would have been declared void, in so far as it was contracted during the subsistence of a valid, albeit potentially polygamous, marriage; being a polygamous marriage contracted in Nigeria according to the Nigerian personal law of the parties at the time of its celebration.[66] Indeed the Western Australian

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65. (1921) 3 N.L.R. 89.

66. For English law, see Baindail v. Baindail [1946] P.122; Srini Vasan v. Srini Vasan [1946] P.67; Mehta v. Mehta [1945] 2 All E.R. 690; Sinha Peerage Claim [1946] 1 All E.R. 348; Shahnaz v. Rizwan [1964] 2 All E.R. 993; Ali v. Ali [1966] 2 W.L.R. 620; Imam Din v. National Assistance Board [1967] 2 Q.B. 213; Alhaji Mohamned v. Knott [1968] 2 W.L.R. 1446.

Canadian law, In Kaur v. Ginder (1958) 13 D.L.R. (2D) 465, a girl contracted a potentially polygamous marriage with a British Columbian domiciliary in India, according to Hindu rites. Later she went through another ceremony of marriage, according to monogamous form, in Washington, with another man. It was held that the Indian marriage created a valid status recognizable in British Columbia and accordingly operated as a complete bar to her re-marriage with another man during the subsistence of the Indian marriage.

American law, the conflicts rules of almost all the American states recognise only a de facto monogamy, regardless of the fact that it was created by monogamous or polygamous rites; provided that the form employed is valid according to the lex loci celebrationis. A subsequent marriage contracted by whatever form during the existence of an earlier marriage is void. See Polydore v. Prince (1837) 1 Ware 402; Fed Cas. No. 11257; Williams v. Oates (1845)

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courts might have been disposed to declare the two marriages valid as polygamous ones, and their issues legitimate for purpose of intestate succession, under certain conditions, on the authority of Haque v. Haque.[67]

Commenting on Adegbola v. Folaranmi,[68] Obi[69] has suggested that the Supreme Court of Lagos should have applied the common

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66. (continued)
27 N.C. 439; Royal v. Cudhay Packing Co. (1922) 195 Ia. 759; 190 N.W. 427, esp. at p.428; Re Dalip Singh Bir's Estate (1948) 188 Pac. 2d. 499. Indeed, if the last (a Californian) case is representative of the attitude of American law to polygamy, one may state with Bartholomew, 13 I.C.L.Q. (1964) 1022 at p. 1068 et seq., that what public policy does not permit in America at present appears only to be the exercise by the husband of the rights associated with a de facto plurality of wives, e.g. the right of co-habitation with more than one wife. For in the last case, it was held that both wives of a Pakistani who died in California could succeed to his intestate estate in California. In his judgment, Adam, J., remarked: "Public policy would not be affected by dividing the money equally between two wives, particularly since there is no contest between them and they are the only interested parties", ibid. at p. 502. See also Restatement Second, of the Conflicts of Laws, (Tent. Draft No. 4) of April 1957; s. 128 and s. 132, Comment b.

French Law, As pointed out in Chapter 1, an actually polygamous marriage, if valid according to the personal laws of the parties at the time they were celebrated, would be recognised in France so as to entitle each of the plural wives to assert in the country her full marital rights. See the decision of Civ. Jan. 1958, D. 1958, 265; and also, Von Landauer in 13 I.C.L.Q. at p.22.

67. [1963] W.A.R. 15; affirmed by the High Court of Australia, (1962) 108 C.L.R. 230; The facts of the case were that the deceased, Abdul Haque, was at all times domiciled in India although he had resided in Western Australia for about 30 years except while he was on periodic visits to India. In September 1951, Abdul entered into a marriage, in Western Australia, with Azra who was domiciled in Pakistan. The ceremony of marriage was according to Moslem rites. There were two children of this marriage. At the time of the Western Australian marriage, Abdul already had a wife, Bibi, and two children by her, living in India. In India, in 1954, he purported to dissolve his marriage with Azra by pronouncing three talaks according to Moslem law. Before his death, Abdul had made a will which the court found to be void. The question for determination in the case was as to who, out of the two wives and four children, were entitled to succeed on the intestacy of Abdul.
It was held, per Wolff C. J., in the Supreme Court of

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law rule recently enforced in the English case of Chard v. Chard.[70] In that case, it was held that the second monogamous marriage contracted in the erroneous belief that the spouse of a first marriage (also monogamous) was dead, was void ab initio on the discovery of the existence of the spouse of the first marriage. Thus applying this rule to Adegbola's case, Obi contends that the second marriage of Harry Johnson which was contracted in Trinidad should have been held void. With this view, we must disagree. It is submitted that such a solution can only be justified by someone who regards the problem from the view-point of the English domestic law. Such view disregards the private international aspect of the case. Since polygamy is permitted in Nigeria, and since mutation of marriage is a concept of the

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67. (continued) Western Australia that:
1. Abdul was validly married to Bibi according to the law of his domicile and that the marriage was potentially polygamous.
2. His second marriage, also according to the law of his domicile, was lawful. Its celebration in Western Australia in a form not authorised by the law of that state was not fatal since the ceremony conformed to the personal laws of both parties and since the marriage would be recognised in India and Pakistan where Abdul and Azra were each domiciled at the time of the marriage.
3. That the talak divorce effected in India in 1954 was valid since it was in accordance with the personal law of the parties.
4. Consequently, that the wife of the first marriage, Bibi, her two children and the two children of Azra, the second wife, all succeeded on the intestacy of Abdul to all his movable properties in W. Australia.

68. (1921) 3 N.L.R. 89.

69. op.cit., p.183.

70. [1956] P.256.

Nigerian law, it is our opinion that though the Trinidadian marriage had been celebrated according to Christian rites, it should have been classified as a polygamous one, thus enabling the wife and children (assuming that there were any) of that marriage to succeed on the intestacy of the deceased together with the wife and children of his earlier marriage. Such a solution is not only just; it would also have been consonant with the expectation of all the parties. Moreover, it would have been based on the proposition that the incidents of a marriage are governed by the personal law of the parties, a proposition which has the support of Asiata v. Goncallo.[71]

We may conclude this section by drawing attention to the fact that the solution reached in Asiata's case is substantially the one adopted in the Canadian case of Connolly v. Woolrich[72] and the Western Australian case of Haque v. Haque,[73] the one in force in Holland as a result of the Dutch-Indonesian relations,[74] and the one favoured by the American law.[75] Thus in the Canadian case, Monk, J., drew a distinction between the role of the lex loci celebrationis and that of the lex domicilii as regards the determination of the incidents of a marriage. Connolly was born in Lower Canada where he had his domicile of origin. At the age of 17, he married an Indian girl of the Cree tribe in the

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71. (1900) 1 N.L.R. 42.

72. (1867) 11 Lower Canada Jurist, 197.

73. [1963] W.A.R. 15; (1962) 108 C.L.R. 230. The case was discussed in n.67 above.

74. See R. D. Kollewijn, "Conflicts of Western and Non-Western Law" in 4 I.L.Q. at pp.322-323.

75. Supra., n.66.

North West Territories of Canada according to tribal rites. The marriage was performed in the tribe, at which Connolly was resident at the time. The spouses cohabited for about 30 years in the tribe before they both returned to Lower Canada. There, Connolly left his Indian wife and purported to contract a marriage with another woman according to monogamous form. In a succession suit, the validity of the Cree tribal marriage was challenged on the footing that it was potentially polygamous and was a marriage which could not be validly celebrated by a person of a different race.

Monk, J., held that notwithstanding the fact that the initial character of the marriage was polygamous according to the laws of the Cree tribe, it was a marriage that would be recognised in Lower Canada. But as regards the right of the husband to take a second wife in Lower Canada, Monk, J., treated it as an incident of the marriage to be governed by the law of Lower Canada, the lex domicilii. He therefore held that the second marriage celebrated according to Christian rites in Lower Canada was void. This decision was based on the finding of fact that, though resident in the North West Territories for about 30 years, Connolly never lost his domicile of origin.

We have indicated above that the English law is tending towards this approach as could be discovered from recent decisions of the English courts. For instance, the decision of Cumming-Bruce, J., in Ali v. Ali[76] lends support to the mounting juristic view in favour of the lex domicilii of the parties governing the right of the husband to take a subsequent wife.

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76. [1966] 2 W.L.R. 620.

In Ali's case, it was held that a potentially polygamous marriage was converted into a monogamous one by the husband's subsequent acquisition of a domicile of choice in England. This, therefore, enabled the court to assume jurisdiction to dissolve the marriage on the ground of the husband's adultery with another woman, after the acquisition of an English domicile. If the incidents of a marriage is immutably fixed at the outset, by or through subsequent events occurring at the lex loci celebrationis, it is difficult to explain how the potentially polygamous marriage between Mr. and Mrs. Ali came to be classified as a monogamous one except on the ground that the proposition that the lex loci celebrationis determines the incidents of a marriage has never been part of the English conflicts rules, or if it was, has now been rejected.[77]

On the basis that Adegbola v. Folaranmi[78] is a bad law, the conclusions reached on the authority of Asiata v. Goncallo[79] may be stated as follows:

1. The initial character of a marriage is determined by the form of ceremony according to the law of the place where the marriage was celebrated.
2. The right of a husband to take an additional wife is governed by his personal law at the time of the subsequent ceremony. Hence

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77. Cf. Professor Jackson, "Monogamous Polygamy" in 40 Aust. L.J. 148 at pp. 149-150, where he states, on the authority of Ali v. Ali, that in the final result it was the English law of domicile of the Alis which decided the incident of the marriage.

78. (1921) 3 N.L.R. 89.

79. (1900) 1 N.L.R. 42.

(a) A marriage which was celebrated in a monogamous form according to the law of the place of celebration may become polygamous by the subsequent acquisition or resumption of a domicile in a country where polygamy is permitted.

(b) A marriage which was celebrated in a polygamous form according to the law of the place of celebration may become monogamous by the subsequent acquisition or resumption of a domicile in a country where only monogamy is permitted.

3. THE LAW DETERMINING THE VALIDITY OF A MARRIAGE

(a) Evaluation of the two rival basic principles

There are two basic rival principles known since the era of the statutists governing the requirements of marriage in private international law. The first principle, accepted by most legal systems of the world, distinguishes between the forms and the essentials in the choice of the law governing the validity of the marriage. This is based on the theory that marriage creates not merely a contract between the parties thereto, but a personal status, which is in the interest of the countries to which the parties belong to regulate and protect. According to this principle, all matters of form, which has been defined as "the external conduct required by the parties or of third persons especially public officers, necessary to the formation of a legally valid marriage",[80] are left to the determination of the lex loci

1. Rabel, The Conflict of Laws Vol.I (2nd ed.) p.224.

celebrationis. Matters which constitute the intrinsic conditions of the marriage, e.g. the absence of relationship within the prohibited degrees of consanguinity, affinity and adoption, non-age and consent of the parties to the marriage, are submitted for determination by the personal laws of the parties. Even though a marriage is validly celebrated abroad according to local form, the personal laws of the parties, determined either by nationality, domicile, religion or ethnic identity, prescribe conditions with which the marriage must conform before it can be regarded as valid. These matters of effective limitation are, in the words of Professor Graveson,

> "regarded as vital to the maintenance of an accepted standard in the matrimonial and family relations of any given society." 81

It follows, therefore, that the purpose of the subjection of the essential requirements of marriage to the personal law is to ensure that the creation of a contract of marriage, which the state recognises by the conferment of its domestic status of husband and wife, wherever made, is not seriously out of line with the thinking behind the state's municipal law.

The second principle which originates in the contract theory, extends the theory to a contract creating status: consequently, it makes no distinction between the formal and essential requirements of marriage. Both matters of form and essentials are submitted to the law of the place where the contract of marriage was made, i.e. the lex loci celebrationis. The English courts applied this principle until the middle of the

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81. Graveson, The Conflict of Laws (6th ed.) p.262.

19th century[82] before it was abandoned in favour of the first principle. This is the basic rule in the United States of America[83] although as pointed out by several American Authorities, an exception is made in most cases to the general rule by both the common law rules and legislative prohibitions of the state in which the parties may be domiciled (immediately after the marriage) as regards such matters as non-age, incest, bigamy or miscegenation.[84] This is done so as to give effect to the stringent public policy of the state where the spouses are domiciled and the result is that a marriage otherwise validly celebrated according to the lex loci celebrationis may be refused recognition if it offends the personal law of the parties. Most of the countries[85] adopting this principle also recognise exceptions to the general rule that a marriage validly contracted at the place of celebration is valid everywhere. For example, the Montevideo Convention of 1940, signed by a group of Latin-American countries[86] provides in its article 13 that

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82. Scrimshire v. Scrimshire (1752) 2 Hagg. Con. 395; Dalrymple v. Dalrymple (1811) 2 Hagg. Con. 54; Jones v. Robinson (1815), 2 Phill. Ecc. 285.

83. See Restatement Second, Para. 121 (Tent. Draft No.4 of 1958); Goodrich, Handbook of the Conflict of Laws (4th ed. by Scoles) p.228.

84. See for example, Goodrich, op.cit., pp.232 et seq.

85. Notably the Philippines, Argentina, Guatemala, Paraguay, Peru, Costa Rica, Denmark and Switzerland. For a detailed operation of this principle in each of these countries, see I, Rabel, op.cit., pp.267-280.

86. Uruguay, Colombia, Bolivia, Argentina, Peru and Paraguay.

> "The capacity of persons to contract marriage, the form of the act by which it is contracted, the fact that the act did take place, and its validity, are governed by the law of the place where it was performed,"

but went on to enumerate certain impediments on account of which the signatory states may refuse to accord recognition to a marriage validly celebrated according to the lex loci celebrationis. These relate to age, relationship within degrees of consanguinity and affinity, bigamy, etc. The effect is that what the first principle achieves by positive rule is attained by way of exception by the second principle. The result is that scarcely is there any system of private international law in which the personal law of the parties does not have a say in the validity of their marriage.

There is no doubt as to which of these two principles governs the validity of monogamous marriages in Nigerian private international law. The position in relation to polygamous marriages will separately be considered later in the light of the above discussion.

(b) Monogamous Marriages

(i) Formal validity of marriage

Although there was lack of direct judicial or statutory confirmation on this point in Nigeria before March 1970, there can be no doubt that as a consequence of the reception of the English common law in Nigeria, the almost universal two-fold rule of determining the formal validity of marriage by the lex loci celebrationis and the essential validity by the lex

domicilii is as much part of the Nigerian law as well as English law.[87]

Thus, as early as 1861, the House of Lords' decision in Brook v. Brook[88] has finally settled the choice of law rule governing the requirement of a monogamous marriage. In that case the law was authoritatively stated as follows:

> "There can be no doubt of the general rule that 'a foreign marriage, valid according to the law of a country where it is celebrated is good everywhere'. But while the forms of entering into the contract of marriage are to be regulated by the lex loci contractus, the law of the country in which it is celebrated, the essentials of the contract depend upon the lex domicilii, the law of the country in which the parties are domiciled at the time of the marriage, and in which matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicile, the marriage may be good everywhere. But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated." 89

Statutory force has now been given in Nigeria to the common law rule that the lex loci celebrationis determines the formal validity of a marriage by section 3 (1) (c) of the Matrimonial Causes Decree, 1970.[90] This sub-section provides that a marriage

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87. See, as to the general statement that the rules of English private international law apply in Nigeria, Arinze v. Arinze [1966] N.M.L.R. 155 and Benson v. Ashiru [1967] N.M.L.R. 363.

88. (1861) 9 H.L.C. 193.

89. Brook v. Brook (1861) 9 H.L.C. 193 at p. 207, per Lord Campbell.

90. Decree No. 18 of 1970 (A federal enactment) contained in Extraordinary Federal Gazette No. 15, Vol. 57 of 20/3/70.

which takes place after the commencement of the Decree, i.e. 17th March 1970, shall be void if it is

> "not a valid marriage under the law of the place where the marriage takes place, by reason of a failure to comply with the requirement of the law of that place with respect to the form of solemnization of /monogamous/ marriages".

But as the distinction between form and essence is not absolute, under this approach, the question as to whether a particular requirement is an essential or a formality may raise some neat problems of classification, especially in border-line cases, as the experience in English conflict of laws has shown. In English law, matters of essential validity of a marriage comprise age, consent of the parties themselves, fraud, mistake, duress, and statutory prohibitions against marriage within certain degree of consanguinity, affinity or adoption; while matters as to the form of the ceremony of marriage itself, e.g. the publication of banns or giving of due notice, and the presence of a priest, registrar or a party to the marriage[91] are classified as formalities of the marriage.[92]

English law differs, however, from the legal systems of many European countries by classifying parental consent as a formal requirement of marriage.[93] But since the Nigerian

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91. Apt v. Apt /1947/, P.127 followed in Ponticelli v. Ponticelli /1958/ P.204.

92. See Graveson, op.cit., (6th ed.) p.263.

93. Simonin v. Mallac (1860), 2 Sw. & Tr. 67; Ogden v. Ogden /1908/ P.46; See also Collett v. Collett /1967/ 3 W.L.R. 280 at p.285.

municipal law is substantially based on the English law, it is hardly surprising that the above English categories of formalities and essentials would seem to be consonant with the spirit of the Nigerian municipal law. Thus, section 33 (2) of the Marriage Act provides that a monogamous marriage shall be void if both parties knowingly and wilfully acquiesce in its celebration under the following circumstances:

(a) In any place other than the Registrar's office or a licensed place of worship, except otherwise authorised by licence;

(b) Under a false name or names;

(c) Without a Registrar's certificate or a licence duly issued;

(d) By a person who is not an authorised minister of religion or a registrar of marriages.

It was further provided by section 33(1) of the Act that

> "A marriage may lawfully be celebrated under this Act between a man and the sister or niece of his deceased wife, but save as aforesaid, no marriage in Nigeria shall be valid which, if celebrated in England would be null and void on the ground of kindred or affinity".

This section has now been replaced by the Matrimonial Causes Decree, 1970.[94] Sections 3 and 5 of the Decree provide that a marriage that takes place after the commencement of the Decree, i.e. 17th March, 1970, shall be void on any of the following grounds:

(a) Existence of a prior marriage by either of the parties;

(b) Prohibited degrees of consanguinity, or affinity;

(c) Lack of consent as a result of duress or fraud;

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63. No. 18 of 1970 (a Federal enactment).

(d) Mistaken identity as to the other person, or as to the nature of the marriage contract;

(e) Mental incapacity to understand the nature of the marriage contract;

(f) Non-age;

(g) Insanity or other mental defectiveness, epilepsy, presence of venereal disease in a communicable form, or pregnancy of the wife through a person not her husband, at the time of the marriage.

A curious omission in both the Marriage Act and the Matrimonial Causes Decree is the vital requirement as to the age of marriage. Finally, the consent of a parent or guardian to the marriage of a person below the age of 21 is made a necessity by section 18 of the Marriage Act, but the provision as to parental consent is less imperative since its non-observance does not vitiate a marriage otherwise valid under the Act.[95]

Two points emerge clear from the above provisions of the Marriage Act and the Matrimonial Causes Decree. Firstly, the enactments separate invalidating acts affecting the ceremony of marriage from those affecting the intrinsic requirements of the marriage. Secondly, if, unlike most systems of law, the absence of parental consent has no invalidating effect on a marriage contracted under the Nigerian Act, it is difficult to discover under what basis such requirement can be regarded as an essential of a marriage under the municipal law.[96]

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95. Agbo v. Udo (1947) 18 N.L.R. 152.

96. The "typical attitude" writes Prof. A. Phillips in the Survey of African Marriages and Family Life, at p. xxxv "of Africans towards statutory marriage, as disclosed by a survey of the whole field ... is one of resistance to any attempt to impose this form of marriage upon them as an obligatory requirement." Perhaps the only explanation that could therefore be given for dispensing with the consent of parents or guardians for the validity of a marriage under the Act was to facilitate the formation of monogamous marriage even in the teeth of parental opposition to such marriages during the colonial period.

But whether or not this municipal classification of parental consent as merely a ceremonial aspect of a marriage should be adopted for purposes of Nigerian private international law is a different matter. As previously stated, most European laws, except the English conflict of laws, classify consent of parents or guardians for a marriage of parties who have not reached a certain age as coming under the general rule regarding the capacity of the parties to marry. Much more, under all systems of customary law in Nigeria and in Africa as well, the opposition of a father to the marriage of his minor child or in some places, that of an adult child, renders such marriage completely void. For the Nigerian courts to carry forward the municipal classification into the Nigerian private international law with the result that parental consent should be regarded as a matter of form to be governed by the lex loci celebrationis, will not only produce a great hardship but cause a lot of injustice. Thus, by way of illustration, we may suppose that A, a Kenya man domiciled in Kenya, married in Lagos a Nigerian woman, B, domiciled in the Lagos State. At the time of the marriage, A was 17 years old while B was aged 16. The marriage took place without the knowledge either of his parents or of her parents. It may be further supposed that by the law of Kenya, a marriage contracted without parental consent by a male person who is below the age of 18 is a complete nullity.[97] After the marriage the parties went to settle in Kenya.

If a Nigerian court is to determine the validity of the marriage, two approaches are possible. The first is to classify

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97. This will, in fact, be the law of Kenya on this point if the recommendation of the Commission for the reform of the laws of marriage and divorce in Kenya is accepted.

parental consent as a formal requirement of the marriage as in the domestic law. The second is to say that such municipal classification need not be extended to a conflict of laws case and to classify it as a substantive requirement of the marriage as under the law of Kenya. By adopting the first approach, the court will have determined the validity of the marriage as regards the requirement for parental consent by the lex loci celebrationis, i.e. the Nigerian law on monogamous marriage, whereas the adoption of the second approach will result in the court regarding such provision of the Kenya law as relating to the capacity of the husband to marry and therefore governed by the lex domicilii, which is also the matrimonial domicile of the parties. Consequently the foreign statute requiring the consent of the husband's parents would have been construed as in the country of its enactment, with the result that the marriage will not only be void in Kenya but equally of no legal significance in Nigeria. Under the first approach, however, even if the marriage is invalid in Kenya it will still be regarded as valid in Nigeria because absence of parental consent does not vitiate a marriage celebrated in Nigeria by the Nigerian woman under the Act. Therefore, a subsequent marriage celebrated in Nigeria by the Nigerian woman either under the Act, Moslem or customary law will not only be invalid but bigamous as well.[98] The result of classifying parental consent as a mere formality of marriage will be the introduction of the unsatisfactory phenomenon - that of

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98. See on this point, s.370 of the Criminal Code of Southern Nigeria as interpreted in R. v. Princewell 1963 .N.N.L.R. 54. Presumably this interpretation will also govern the similar provision of the Criminal Code of Northern Nigeria, s.384.

limping marriages - i.e. when the parties are regarded as married in one country but unmarried in the other, into the system of Nigerian private international law.

The facts of the above hypothetical case are substantially the same with that of the English case of Ogden v. Ogden[99] where Sir Gorrell Barnes, P. regarded the requirement for parental consent stipulated as an absolute requirement by the French lex domicilii of the husband as a formal one which, as a consequence, had no effect under English law, the lex loci celebrationis. It is submitted that the decision in Ogden v. Ogden, apart from the fact that it has only a persuasive effect on the Nigerian courts, must be considered in the historical context from which it arose. In that case, although Sir Gorrell Barnes paid lip service to the binding effect of Brook v. Brook, a case which established the rule that the essentials of a marriage are to be governed by the lex domicilii, a close reading of the judgment in Ogden's case will reveal that he was not particularly happy about the role allocated to the law of domicile in Brook's case. Thus he stated:

> - "The English courts have not been very ready to admit a personal law of status and capacity dependent on domicile, and travelling with a person from country to country, although there has been, perhaps, less unwillingness in later years to give effect to the lex domicilii to some extent." [1]

The unfavourable view he took of Brook's case is illustrated by his statement that it had not been accepted in America and that it had been criticised by some American decisions.[2] Sir Gorrell's

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99. /1908/ P.46.

1. Ogden v. Ogden /1908/ P.46 at p.58.

2. Ibid., pp. 66 and 77.

argument throughout the case was concerned with justifying the principle of lex loci celebrationis as the law governing the requirements of marriage (formal as well as essential). To have classified parental consent as an essential requirement of marriage which is to be determined by French law under such circumstances would have been contrary to his assumption that Brook's case, even though a House of Lords' decision, was based on a wrong statement of the law. The ensuing chaos which the decision in Ogden's case has caused has evoked diverse criticism.[3]

Various methods have been suggested for dealing with the problem of divergent classification in private international law.[4] As regards the consent of parents or guardians as a requirement for the validity of a marriage, one solution proposed is to "define the notion of formalities in a universally acceptable sense" and so also classify by implication what is omitted as "essentials".[5] Since this solution is an Utopia still to be reached by the legal systems of the world, an immediate solution must be found for the current problem of divergent classification.

A second one, on which there is a certain degree of uniformity of opinion among writers in the common law world, is to submit the question of whether a particular requirement of marriage e.g. that of parental consent, is an essential or a mere

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3. Dicey-Morris, op.cit., p.238; Cheshire, op.cit., pp.48-51; Westlake, op.cit., Para.25; Hughes, "Judicial Method and the Problem in Ogden v. Ogden" 44 L.Q.R. (1928) 217; Beckett, 15 B.Y.B.I.L. (1936) 46, at p.80; Falconbridge, 53 L.Q.R. 235 at p.247; Falconbridge, Essays in Conflict of Laws, (2nd ed.) pp.74-77.

4. For a detailed discussion about the several approaches to the problem, see Dicey-Morris, pp.23-29.

5. I, Rabel, p.225.

formality to the personal laws of the parties.[6] Thus according to this suggestion, if the requirement for parental consent is, by its terms and social context in the law of one country, regarded as a matter of capacity to marry, and in the law of another country is regarded as a matter of formality, a marriage contracted between persons having the laws of both countries as their leges domicilii must satisfy the more stringent provision for parental consent for its intrinsic validity. In other words, a foreign provision relating to parental consent would have been elevated to the category of essential of marriage in a conflict of law situation if such was its import according to the foreign law even though this requirement is no more than a mere formality in the domestic law. Reason and logic would seem to demand such a solution and it is accordingly submitted that this approach would be the ideal solution for the characterisation of parental consent in the Nigerian private international law.

(ii) Essential validity of marriage

The effect of a uniform law on interstate conflicts

It has been observed above that it is a principle well received into the Nigerian private international law that the essential requirements of marriage, or as often put, the capacity of the parties to enter into a marriage, is governed by the "lex domicilii" of the parties.[7] But before a detailed discussion is

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6. Dicey-Morris, pp.237-239; Graveson, p.265 et seq.; Falconbridge, Essays in Conflict of Laws (2nd ed.) p.81; Cheshire, p.49, though he differs as to the determination of the personal law that should be applied. See below.

7. See the extract from the judgment in Brook v. Brook quoted above.

embarked upon on the meaning of this term, it will be necessary to make a brief observation on the relevance or otherwise of this principle in interstate conflicts in Nigeria.

As previously pointed out, the effect of regionalisation in Nigeria is that for purposes of private international law, each of the Nigerian states is a foreign country in the courts of the other.[8] But it was also observed in chapter two that the enactment of the Marriage Act by the Federal Parliament in exercise of its constitutional powers has necessarily resulted in the law relating to monogamous marriages having a universal operation throughout Nigeria. Furthermore, the same conflict rules apply in all the states of the country. The only logical conclusion that could be drawn from this situation is that a uniform law on monogamous marriage has rendered obsolete all conflictual problems (including a distinction between essentials and formalities of marriage) between the Nigerian states. Consequently, a marriage validly celebrated according to the provisions of the Act anywhere in Nigeria is valid as to form and essentials if the parties are domiciled in any of the states of Nigeria.

International Conflicts

Three solutions claim for consideration in the "lex domicilii" that might determine the essential validity of a marriage in international conflicts. As pointed out by a foreign and impartial judge in an Australian case,[9] English law would

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8. Chap. 1, pp.54-60.

9. Miller v. Teale [1954], Argus L.R. 1109 at p. 1113, per

seem not to have

> "reached a final conclusion as to the choice of law governing general capacity to marry and the choice of law governing particular impediments or prohibitions."

The key problem in this connection is the uncertainty as to whether reference to the lex domicilii is ultimately to be made.

(i) to the antenuptial leges domicilii of the husband and wife, or

(ii) to the matrimonial domicile of the parties or, alternatively, to the lex domicilii of the husband at the time of marriage.

The cases do not speak with one accord and there is wide disagreement between English text writers, a controversy in which foreign learned writers have joined. Few of the English cases reveal an insular approach which the adherents of one view claim as anomalous and which the protagonist of the other view hail as championing their school of thought.

The position in Nigeria is still a state of flux as the Nigerian courts have not been called upon to make a settled determination on the question.[10] It will, therefore, be necessary, firstly, to consider these divergent juristic views; secondly, to indicate which of the solutions proposed has the preponderant support of judicial authority, before a consideration is made of what is the most logical solution the Nigerian courts could adopt.

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10. But see below as regards the law governing the validity of a polygamous marriage.

(1) The Antenuptial Leges Domicilii of the Parties

The "traditional and still prevalent" view is forcefully stated in one of the leading textbook on the subject as

> "Capacity to marry is governed by the law of each party's antenuptial domicile." 11

This general rule is however stated as being subject to four exceptions only one of which we are here concerned with. This provides that

> "The validity of a marriage celebrated in England between persons of whom one has an English, and the other a foreign, domicile is not affected by any incapacity which, though existing under the law of such foreign domicile, does not exist under the law of England." 12

This is also the view of Prof. Graveson who appears to have adopted a purely positivist approach in stating that, on the basis of English judicial authority, the modern rule is that

> "The essentials of a marriage are governed by the law of the domicile of each party at the time of the marriage." 13

We shall have cause to return to what is believed to be his preference in the ultimate solution of which law determines the essential validity of a marriage.

(2) The Matrimonial Domicile of the Parties or the lex domicilii of the Husband at the time of Marriage

Professor Cheshire, on the other hand, maintains with forcible argument, not only on the basis on what the law should

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11. Dicey-Morris, p.254.

12. Ibid., p.269. This exception is based on the English case of Sottomayor v. De Barros (No.2), (1879) 5 P.D.94.

13. Graveson, p.269.

be but that the rule deducible from the English decisions is that the essentials of marriage are governed by the law of the matrimonial domicile of the parties. The "correct" doctrine is stated by him as follows:

> "The basic presumption is that capacity to marry is governed by the law of the husband's domicile at the time of the marriage, for normally it is in the country of that domicile that the parties intend to establish their permanent home. This presumption, however, is rebutted if it can be inferred that the parties at the time of the marriage intended to establish their home in a certain country and that they did in fact establish it there within a reasonable time." 14

Among other English text writers, the doctrine of the matrimonial domicile has the support of Dr. Schmithoff[15] and Foote.[16] The basic argument underlying the theory is that

> "whether the intermarriage of two persons should be prohibited for social, religious, eugenic or other like reasons is a question that pre-eminently, if not exclusively, affects the community in which the parties live together as man and wife,"

- a view which had previously been expressed by Lord Brougham in Warrender v. Warrender[17] in the following classical language:

> "A connection formed for cohabitation, for mutual comfort, protection and endearment, appears to be a contract having a most peculiar reference to the contemplated residence of the wedded pair; the home where they are to fulfil their mutual promises, and perform those duties which were the objects of the union, in a word, their domicile." 18

As pointed out by Anton,[19] when the theory was first evolved, its force lay almost exclusively, apart from the statement of Lord

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14. Cheshire, p.277.

15. English Conflict of Laws, pp.312-313.

16. Private International law (4th ed.) p.567; (5th ed.) p.384.

17. (1835) 2 Cl. & Fin. 488.

18. Ibid., at p. 536.

19. Private International Law, p. 278.

Campbell in Brook v. Brook[20] and the authority of Savigny,[21] on its practical merits. The doctrine has since gained a "measure of retrospective authority" by reason of few English decisions and an array of obiter dicta of the English judges, all of which were cited in support by Professor Cheshire.

Thus in De Reneville v. De Reneville[22], Lord Green said:

> "The validity of a marriage so far as regards the observance of formalities is a matter for the lex loci celebrationis. But this is not a case of forms. It is a case of essential validity. By what law is that to be determined? In my opinion by the law of France, either because that is the law of the husband's domicile at the date of marriage or (preferably, in my view) because at that date it was the law of the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage."

The judgment of Bucknill, L.J., proceeded on similar lines:

> "To hold that the law of the country where each spouse is domiciled before the marriage must decide as to validity of the marriage in this case might lead to the deplorable result if the laws happened to differ that the marriage would be held valid in one country and void in the other country. For this reason I think it essential that the law of one country should prevail, and that it is reasonable that the law of the country where the ceremony of marriage took place and where the parties intended to live together and where they in fact lived together should be regarded as the law which controls the validity of their marriage." 23

It must be pointed out that the case was concerned with a nullity petition by the wife on the grounds of the impotence and the wilful refusal to consumate the marriage on the part of the husband. These the Court of Appeal classified as matters of

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20. (1861), 9 H.L.C. 193, an extract of which is quoted above.

21. A Treatise on the Conflict of Laws (W. Guthrie's Translation) 1869, p.240.

22. [1948] P. 100 at p. 114.

23. Ibid., at p. 121.

essential validity of the marriage to be governed by the law of the French matrimonial domicile of the parties.

To like effect is the obiter dictum of Denning, L.J., (as he then was) in Kenward v. Kenward[24] where he instanced the case of an Englishwoman domiciled in England who married a man of a polygamous race in his homeland by the ceremony of his country,

> "intending to live with him there, well knowing that she is entering into a marriage that is potentially polygamous".

He then gave his view as to what law should determine the intrinsic validity of such marriage by saying that

> "the substantial validity of that marriage depends on the personal law of the husband and not on the personal law of the wife. The marriage is valid by the law of that country and is, I should have thought, valid here."

Finally, Sachs, J., in Ponticelli v. Ponticelli[25] observed obiter in his judgment that

> "It is surely a matter of some importance that the initial validity of a marriage should, in relation to all matters except form and ceremony (to which a uniform general rule already applies), be consistently decided according to the law of one country alone - a point of view which seems to be supported by the judgment of Bucknill L.J., in De Reneville v. De Reneville."

The above statements led Professor Cheshire to conclude that if the court of appeal in England has occasion to pronounce on the law that should determine the essential validity of a marriage, it will definitely come in favour of the law of the matrimonial domicile of the parties.

Professor Graveson, while disagreeing with Professor Cheshire that the doctrine of matrimonial domicile does not

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24. [1951] P. 124 at p. 145.

25. [1958] P. 204 at p. 215.

represent English law, the former's objection does not extend as far as to a disapproval of the doctrine for future application. Indeed, "the future may justify its acceptance", he wrote in 1938,

> "but past decisions adduced in its support are at most, with one or two very doubtful exceptions, only equivocal for one theory or another." 26

While admitting that the doctrine of matrimonial domicile is not new to the common law world and that it had been employed to determine the rights of spouses in each other's property both in England and America, he observed that

> "as a theory of law to govern the validity of marriage the doctrine of matrimonial domicile, like the English doctrine of 'proper law' has much to commend it." 27

He pointed out that the proposition "set forth with such skill by Dr. Cheshire is the saner and sounder rule" and that it is more favourable than the domiciliary control of the capacity of the parties to contract a marriage.

Professor Graveson, however, objected to the theory of matrimonial domicile at its inception principally on grounds of its definition which Prof. Cheshire gave in the first edition of his work as "the domicile of the husband at the time of marriage," i.e. intended home of the parties after marriage.[28] Prof. Graveson argued that although the situation of the matrimonial domicile of the parties being different from that of the husband is rare indeed, yet this need not necessarily be so in all cases as an English case[29] had shown. The intended matrimonial

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26. Graveson, "Matrimonial Domicil and the Contract of Marriage", 20 Jour. Comp. Leg. (1938) 55 at p. 67.

27. Ibid., at pp. 66-67.

28. Cheshire, (1st ed. 1935) at pp. 154 and 392.

29. Colliss v. Hector, (1875) L.R. 19 Eq. 334.

home may be that of the wife or a domicile in some other third country. He therefore submitted that to determine the essentials in Marriage by the law of the country where the husband is domiciled at the time of marriage, which may not constitute the actual domicile of the parties after marriage, is objectionable.

In his own words,

> "The objection is not against a conception which permits of the application to present facts of a law under which the parties about to marry intend to live their married lives. It is against the description and application of such a law as the law of the domicile of the parties when in fact the parties are not domiciled within the jurisdiction of that law so that it may rightfully claim to control their personal acts." 30

He went on to point out that the conception of matrimonial domicile as then defined by Prof. Cheshire was not predicated upon the factual residence, and also not coupled with the necessary animus manendi, of both parties, especially the woman; that until a person acquires a new domicile under the common law rules, to classify a country in which he intends to settle permanently in future as his domicile - by whatever name qualified - is a misnomer. And finally that the doctrine admitted the possibility of the co-existence in one person of two operative domiciles at the same time, a situation which is not permitted under the law. Having gone so far in objecting to the description of matrimonial domicile, he remarked that

> "It appears to be of first necessity to select one law, as the advocates of the matrimonial domicile have done, to govern capacity to marry. Further, it is clear that such selected law should be that of a system truly and universally common to the parties." 31

He therefore concluded by suggesting that

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30. 20 Jour. Comp. Leg. (1938) 55 at p. 58.

31. Ibid., p. 67.

> "the name of matrimonial domicile, being a legal misdescription, should be changed to that of marital (or matrimonial) residence"

and that matrimonial domicile should be reserved for use only to describe the domicile of the married pair when, and not before, they are married, and have acquired a common domicile.[32] Otherwise, he said, matrimonial domicile as then defined by Prof. Cheshire would be tantamount to "a domicile of hope, of desire, of sincere intention and a domicile of the uncertain future." The adoption of these suggestions, he hoped, would be advantageous in several aspects, chief among which is that the doctrine will ensure simplicity and certainty in the determination of the law that governs the essential validity of marriage.

Apparently, these objections have been met by Prof. Cheshire. For while the first and second editions of his work defined the matrimonial domicile of the parties as the place where the parties intend to establish their matrimonial home,[33] subsequent editions had been modified to take account of these criticisms. Although the term "intended matrimonial home" is still currently being used, it is emphasised by him that the law of the intended matrimonial home should not be applied to determine the essential validity of a marriage unless and until the parties, after their marriage, in fact establish a domicile there within a reasonable time.[34] In other words, the law of the matrimonial domicile only applies as such when both parties

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32. 20 Jour. Comp. Leg. (1938) 55 at p. 69.

33. Cheshire, (1st ed.) pp. 154 & 392; (2nd ed.) p. 221; cf. p. 269, 297, 307, 316 and 277 in the 3rd to 7th editions respectively.

34. Cheshire, pp. 277-278.

establish according to the common law rules a new domicile at such a place.

It is interesting to note that 10 years later, after the theory of matrimonial domicile has been so modified, Prof. Graveson suggested that

> "much can be said in favour of the principle of referring the essentials in marriage to the proper law of the marriage by analogy to the general law of contracts"

and that the dicta of Lord Green and Bucknill, L.J., in the case of De Reneville v. De Reneville quoted above "constitute a starting-point for new and welcome developments in the law.[35] His support for the doctrine of matrimonial domicile in the new form as the ultimate solution for control of essentials in marriage in English law appears not to have waned.[36]

Juristic Support for the law of Matrimonial Domicile in America and other Countries

We commenced our discussion on this part by pointing out that what the English law achieves by positive rule, i.e. by determining the essential validity of a marriage by the lex domicilii of the parties, is attained by a rule of exception in America. That despite the general American rule that a marriage valid where celebrated is valid every where, the lex domicilii of the parties determines in the ultimate analysis whether such marriage is intrinsically valid since the marriage has to satisfy prohibitions upon marriage imposed by the law of the domicile of the parties. Where the parties did not have a common domicile at the

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35. Graveson, "Recent Developments in Nullity Marriages" in 12 Conveyancer and Property Lawyer (1948), 185 at p. 190.

36. Graveson, Conflict of Laws (6th ed.) p. 279.

time of marriage, which continues as the matrimonial domicile of the parties after marriage, the American law has shown greater persistence than English law in sustaining the validity of the marriage if it complied with the prohibitions of the law of the common domicile of the parties immediately after marriage.

> "No American case has been found invalidating an otherwise valid marriage in which the forum's only contact was as the domicile of but one party at the time of the marriage." 37

Thus it is stated by the learned editor of Goodrich[38] that

> "On principle, it seems clear that to be sufficiently concerned with a marriage to declare it invalid under its local policy, a state should have more substantial contact with the marriage than solely as the domicile of one of the parties at the time of marriage. Because marriage is an enduring relationship at the heart of the family structure in society, it is the state in which the parties live as a family that has the most substantial interest. Living together as a family within a state seems necessary to give a state sufficient interest to impose upon the parties a requirement other than those already satisfied elsewhere."

A similar view is expressed by Taintor when he stated that

> "the state whose laws should be looked to in order to discover a public policy strong enough to require a declaration that a particular marriage is void for a vice of substance is that in which the parties will live as man and wife - the intended family domicile. No domicile at the time of the ceremony has, as such, a sufficiently strong interest to justify the application of its laws to determine whether or not the parties are of such qualities, or in such relationship, that their marriage should be declared void, nor to determine that their marriage should be declared valid if the status is one which offends a strong public policy of the intended family home." 39

However, the American Second Restatement of the Conflict of Laws[40] seems to have departed from the theme of this doctrine;

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37. Goodrich, Conflict of Laws (4th ed. by E. F. Scoles) p. 239.

38. Ibid.

39. Taintor, "Marriage in the Conflict of Laws", 9 Vand. L.R. (1956) 607 at pp. 611-612. See also the same author "What Law Governs Status of Marriage" in 19 B.U.L.R. 353 at pp. 370-371.

40. Restatement Second (Tent. Draft No.4 of 1957) pp. 94, 98 & 99.

for having provided that a marriage valid where celebrated is valid everywhere, it then concentrates on the state having a paramount interest in the intrinsic validity of the marriage. This state it defines as a state where, at least, one of the parties was domiciled at the time of the marriage and where both parties intend to make their home thereafter.

This conception of the "state having paramount interest" as defined in the second Restatement has been vigorously criticised by Professor Ehrenzweig as lacking support in authority and objectionable on policy grounds in that it

> "would deny validating effect to the law of the state of the spouses' first (intended or actual) domicile if that state was not also the state of either party's prior, and thus continued domicile." 41

Having admitted that the doctrine of the intended matrimonial domicile might on occasion result in the validity of a marriage being governed by the law of a place where the parties have never been, he concluded that the best solution would be

> "to give validity to any marriage valid under the law of the parties' first actual postnuptial domicile." 42

Furthermore, in considering the amount of credence that should be given to the Restatement Second on this point in America, it

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41. Ehrenzweig, "Miscegenation in the Conflict of Laws: Law and Reason versus the Restatement Second" in 45 Cornell L.Q. 659 at p. 672.

42. Ibid., at p.672. It must be pointed out, however, that Professor Ehrenzweig in formulating his "rule of validation" for the validity of a marriage supports only in a remote way his statement that the law of the first actual domicile of the parties should govern the intrinsic validity of the marriage. For in his conclusion, the rule of validation is stated as follows: "A marriage is valid if it is valid according to the law of the state where the marriage took place, or where at least one of the parties was domiciled at the time of the marriage, or where the parties were domiciled at the time the suit was commenced; provided only that ... 'the will and purpose of the parties to unite in marriage clearly appears' and that the marriage is not offensive to an overriding policy of the forum." Thus it will be seen that unless "where the parties were domiciled at the time suit was commenced" is construed as the first actual

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must be remembered that the Restatement is still in a tentative draft. Even in its final form, it is not more than a logical setting down of what are considered to be the more authoritative conflict rules applicable throughout the American States.[43] It is not a code of laws and in fact has no binding force, but is merely of persuasive value. It would seem that the view of the above American writers is more representative of the law that governs the intrinsic validity of marriage in America, i.e. the law of the matrimonial domicile of the parties immediately after marriage.[44]

In concluding the juristic view on this matter in the common law world, it may be pointed out that the doctrine of matrimonial domicile had been advocated by Dr. Farran for testing the essential validity of a marriage in the Sudan.[45]

Evaluation of the English Cases

The first case in this respect is the House of Lords' decision in Brook v. Brook.[46] In that case a domiciled Englishman married in Denmark his deceased wife's sister, also domiciled in England while both were on a temporary visit to Denmark. Such a marriage was valid under the Danish law but at that time void in England on the ground of affinity. In the court below,[47]

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42. (continued) postnuptial domicile of the parties, no further reference was made to the first actual postnuptial domicile of the parties in the rule formulated.

43. Graveson, op.cit., p. 29.

44. See also, Cook, Logical and Legal Basis of the Conflict of Laws, p. 499.

45. Farran, Matrimonial Laws of the Sudan, pp. 209-210.

46. (1861) 9 H.L.C. 193.

47. (1858) 3 Sm. & G. 481.

Stuart, V.C., held that the marriage was void and adduced three reasons for holding the marriage invalid. First, that the public policy of England prohibited the marriage; secondly, that the Marriage Act, 1835 was of a personal nature and followed the person all over the world and thirdly, that England was the country where the contract of marriage was to have its permanent effect.[48] In the House of Lords, most of the Law Lords[49] also held that the marriage was void by force of the English Marriage Act, It was left for Lord Campbell to provide the relevant principle governing the essential requirement of the marriage such as relationship within the prohibited degrees of affinity. The judgment of Lord Campbell has already been quoted above.[50] In it he described the lex domicilii that should govern such essentials as

> "the law of the country in which the parties are domiciled at the time of marriage, and in which the matrimonial residence is contemplated."

This judgment thus constitutes the foundation for the theory that the law of the matrimonial domicile governs the capacity of the parties to marry.

Added support is given to this view by the citation made by Lord Campbell of the case of Warrender v. Warrender[51] in justifying the importance to be attached to the law of the matrimonial domicile in the control of essentials in marriage;

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48. Brook v. Brook (1858) 3 Sm. & G. 481 at 527-529.

49. Lord Cranworth, Lord St. Leonards and Lord Wensleydale.

50. Supra, p. 183.

51. (1835) 2 Cl. & Fin. 488.

as a result he expressed a doubt whether the marriage in Brook's case would have been held valid even in Denmark since the parties were domiciled in England at the time of marriage and England was to be their matrimonial residence. Consequently, he went on to amplify the principle by stating that

> "The principle being established that the incidents of the contract of marriage celebrated in a foreign country are to be determined according to the law of the country in which the parties are domiciled and mean to reside, the consequence seems to follow that by this law must its validity or invalidity be determined. 52

Approaching, therefore, Lord Campbell's judgment with an unbiased mind, it cannot be disputed that the decision supports the theory that the law of the matrimonial domicile of the parties controls the essential validity of their marriage if the country in which the parties are domiciled at the time of the marriage continues as their matrimonial domicile after the ceremony of marriage. But it would seem not to offer any guidance in a situation where the antenuptial domicile of the parties does not constitute their matrimonial domicile after the ceremony. Perhaps this accounts for why judges in subsequent decisions found it difficult, as the ensuing discussion of other cases will show, to accept the rather restricted ratio decidendi of Brook's case as applicable to all diverse situations.

Mette v. Mette[53] represents the first case in which the parties were domiciled in different countries before the celebration of their marriage. In that case, a native of Germany was naturalised in England and became a domiciled British subject. After the death of his first wife, and while on a visit to Germany, he married his deceased wife's half-sister, who was

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53. (1859), 1 Sw. & Tr. 416.

a German national domiciled in Germany. It was argued that since England was the contemplated matrimonial domicile of both the parties, the capacity of the parties to contract the marriage should be determined by the law of England and Brook's case was cited in support. The judge followed Brook v. Brook in classifying the Marriage Act, 1835 as one of a personal nature which applied to British subjects domiciled in England. The marriage, valid by German law but prohibited by the English Marriage Act, was held to be void. Sir Cresswell Cresswell was not specific on the point raised by the counsel as to whether English law applied as the matrimonial domicile of the parties after marriage or because it was the antenuptial domicile of the husband, except in one of the two contradictory statements to this effect contained in his judgment. In the first he stated that

> "there could be no valid contract unless each was competent to contract with the other /and/ the question rests upon the effect of domicile". 54

In the other, he observed that the husband

> "remained domiciled in this country, and the marriage was with a view to subsequent residence in this country" -

words suggesting that Sir Cresswell Cresswell was applying the principle later enunciated by Lord Campbell in Brook's case. One must accordingly agree with Prof. Cheshire that the decision does not settle the controversy as to whether the essential validity of a marriage is to be determined by the antenuptial domicile of each of the parties or the matrimonial domicile.

But in Sottomayor v. De Barros (No. 1),[55] the Court of Appeal made a decisive break with the doctrine of the matrimonial

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54. Mette v. Mette (1859) 1 Sw. & Tr. 416 at 423.

55. (1877) 3 P.D. 1.

domicile and held that the essential requirements of a marriage should be determined by the law of domicile of each of the parties at the time of the marriage. The parties in the case were Portuguese subjects domiciled in Portugal. They were first cousins, who contrary to the prohibition imposed by Portuguese law on marriage between first cousins, celebrated a marriage in England. Such marriage was allowed under English law. They retained their Portuguese common domicile after marriage, although they resided in England for some years before they shifted their residence to Portugal. In fact at the time of marriage both parties were minors and consequently had no capacity to establish a matrimonial domicile in England. In a petition by the wife praying for the annulment of her marriage, the Court of Appeal reversing the judgment of Sir Robert Phillimore in the court below,[56] held the marriage null and void. The principle applicable was stated by Cotton L.J., in the following terms.

> "The law of country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted: but as in other contracts, so in that of marriage, personal capacity must depend on the law of the domicile; and if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this, in our opinion, imposes on the subjects of that country a personal incapacity, which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between persons both at the time of their marriage subjects of and domiciled in the country which imposes this restriction, whenever such marriage may have been solemnised." [57]

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56. (1876) 2 P.D. 81.

57. (1877) 3 P.D. 1 at p.5.

Cotton L.J. however observed that the decision should not be taken as laying down a general principle and that the opinion in the appeal

> "is confined to the case where both the contracting parties are, at the time of their marriage, domiciled in a country the law of which prohibit their marriage".

Earlier on, the case had been referred to the Queen's Proctor who raised the question of fact that both the husband and wife appeared to have acquired a domicile in England at the date of marriage. The case was therefore remitted to the Divorce Division in order that the question raised by the Queen's Proctor should be determined. In Sottomayor v. De Barros (No.2)[58] Sir James Hannen found as a fact that the husband had acquired an English domicile of dependence in 1861 before the marriage was celebrated in England in 1866. Applying the dictum of Cotton L.J. in the first Sottomayor's case that "no country is bound to recognise the laws of a foreign state when they work injustice to its own subjects" the lower court held the marriage valid since it was valid by English law. To achieve this end, however, Sir James Hannen had to base his decision on the ground that capacity to marry is governed by the law of the place of celebration - a principle which is clearly untenable since the House of Lord's decision in Brook v. Brook[59] and which is also incompatible with the Court of Appeal's decision in the first Sottomayor's case.

On the basis of the decision in the second Sottomayor's case, an "inelegant" and "anomalous" exception was created to the principle that the essential validity of marriage should be

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58. (1879) 5 P.D. 94.

59. (1861) 9 H.L.C. 193.

determined by the antenuptial leges domicilii of the parties. For continuity of thought it will be necessary to repeat this insular doctrine as formidably set out in the leading text of English authority on Conflict of Laws. Thus according to Dicey-Morris,[60]

> "The validity of a marriage celebrated in England between persons of whom one has an English, and the other a foreign, domicile is not affected by any incapacity which, though existing under the law of such foreign domicile, does not exist under the law of England." [61]

This principle which had been followed in a subsequent case of Chetti v. Chetti[62] "has acquired world-wide notoriety".[63] In the words of Falconbridge[64] the rule is

> "unworthy of a place in a respectable system of the conflict of laws which ... should attempt to deal with converse situations according to a single principle without showing undue partiality for the domestic law of the forum or for domestic party".

According to Prof. Cheshire this exception makes nonsense of the dual domicile rule.[65]

(iii) Conclusion

From the above analysis of the English decisions having an authoritative effect in Nigeria, it will be clearly seen that the authorities are lacking in clarity and consistency about the law

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60. Dicey-Morris, p. 254.

61. See also Graveson, p. 273.

62. [1909] P. 67 at pp. 81 et seq.

63. Cheshire (7th ed.) p. 285; Graveson, "Matrimonial Domicil and the Contract of Marriage", 20 Journ. Comp. Leg. (1938) 55 at p. 65; Foster, "Some Defects in the English Rules of Conflict of Laws", 16 B.Y.B.I.L. (1935) 84 at p. 88; Falconbridge, Essays on Conflict of Laws (2nd ed.) p.711; Rabel, op.cit., Vol.I, p.281.

64. Ibid.

65. Cheshire, p. 285.

that determines the essential validity of marriage. As a result of the association of the domicile of the parties at the time of marriage with the matrimonial domicile after the ceremony which permeates Lord Campbell's judgment in Brook v. Brook, that case would seem to be consonant only with the rule that the law of the matrimonial domicile of the parties determines the essential validity of their marriage if the common antenuptial domicile continues as their matrimonial domicile. Mette v. Mette seems equivocal since Sir Cresswell Cresswell based his decision on the grounds that both the law of the matrimonial domicile and the law of domicile of each of the parties at the time of marriage are relevant. The decision in the first Sottomayor's case undoubtedly proceeded on the basis that the essential validity of marriage should be controlled by the antenuptial lex domicilii of each of the parties but the Court of Appeal expressly limits the principle established in the case to situations where the parties have a common domicile at the time of their marriage. In the second Sottomayor's case, the principle of the lex loci celebrationis which had been rejected 18 years earlier by the House of Lords was resorted to to achieve a chauvinistic rule of exception which has evoked a world-wide criticism.

It is true that subsequent decisions in England, viz. Pugh v. Pugh[66] and Re Paine[67] have declared an open support for the view that capacity to marry must be tested by the lex domicilii of each party. These cases, however, are only of persuasive effect on the Nigerian Courts.[68] Moreover, the doctrine

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66. [1951] P. 482; [1951] 2 All E.R. 680.

67. [1940] Ch. 46. See also Padolecchia v. Padolecchia [1968] P. 314, [1968] 2 W.L.R. 173 and R. v. Brentwood Superintendent Registrar of Marriages, Ex parte Arias [1968] 3 All E.R. 279.

68. See Chap. One.

of matrimonial domicile does not conform with the provisions of the Marriage (Enabling) Act, 1960, an English statute which, in elimination of a previous statutory restriction, provides that a marriage between a man and his divorced wife's sister, aunt or niece, and also between a woman and her divorced husband's brother, uncle or nephew, should be valid.[69] Having removed this impediment on marriage between such class of people, the Act at section 1(3) provides a choice of law rule which stipulates that such marriage shall be invalid

> "if either party to it is at the time of the marriage domiciled in a country outside Great Britain, and under the law of that country there cannot be a valid marriage between the parties."

Although the above statutory choice of law rule is limited to the prohibited degrees of affinity and does not purport to determine the applicable law for other essentials in marriage, it must have gone a long way in resolving the controversy as to the law which determines the essential validity of marriage. Indeed it will appear illogical to limit its application to such a narrow confine. This much is conceded by Prof. Cheshire whose justification for the retention of his criticism of the dual domicile rule lies in the hope that the English private international law relating to capacity to marry will ultimately be clarified in favour of the matrimonial domiciliary law of the parties. However, it is obvious that this statutory choice of law rule, being contained in an English statute enacted after 1900 and which was not incorporated by reference as part of the Nigerian law, does not apply in Nigeria.

In view of the inconsistency of the English judicial authorities on this point at the time of the reception of the common law in Nigeria, the fact that post-1900 decisions of the

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69. S. 1(1).

English High Courts which support the dual domicile rule are only of persuasive effect in Nigeria and the inapplicability in Nigeria of the statutory choice of law rule contained in the English Marriage (Enabling) Act, 1960, it is submitted that the way is open for the Nigerian courts when framing their own choice of law rules to choose which doctrine it would adopt for testing the essentials in Marriage.

In arriving at a decision on this point, the following factors, it is submitted, must be taken into consideration. No doubt, the dual domicile rule secures the interests of the two countries of domicile of the parties when they are different. But strictly applied, the maximum validity of marriages and uniformity of result are difficult to achieve. The rule may also frustrate the expectations of the parties and the community of the country in which they live as husband and wife if a marriage is celebrated with a view to establishing a matrimonial home in such country and such intention is promptly carried into effect. Its adoption in England has necessitated the establishment of a corrective doctrine to overcome the patent objection to applying a foreign incapacity unknown to English municipal law.[70] All these defects of the dual domicile rule would seem to suggest that the doctrine of matrimonial domicile, in the sense of an immediate post-nuptial domicile of the spouses, is better suited for determining the capacity of the parties to marry.

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70. Dr. Morris has suggested that as a result of s.1(1) of the Marriage (Enabling) Act, 1960, the English courts should now be able to eliminate this corrective doctrine. See Dicey & Morris, p.270. But if, as explained by Kahn-Freund in 39 Tr. Gr. Soc. 39, at pp.53-57, the exception is an instance of the English Public Policy preventing the application of a foreign law otherwise applicable, the elimination of this exception may be difficult to achieve. Indeed this suggestion appears to have been given substance in Cheni v. Cheni [1965] P.85 at p.98, where Sir Jocelyn Simon stated that the Court has a judicial discretion to refuse to give

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It will be pertinent to observe in this connection that such considerations would seem to have led the Supreme Court of Kenya in the case of Re Howison's Application[71] to express its preference for the doctrine of matrimonial domicile in determining the capacity of a Scottish girl, domiciled in Scotland, to enter into a potentially polygamous marriage in Kenya with a man domiciled in Kenya. In that case, Rudd, J., having fully considered the divergent juristic views on this point, observed that the trend of modern judicial development will justify the marriage being held valid in accordance with the law of Kenya, the matrimonial domicile.[72]

On the other hand, an exclusive application of the law of the matrimonial domicile for the control of essentials in marriage fails in one particular respect. For example, we may suppose that H domiciled in country X married W domiciled in country Y, both intending to establish a matrimonial home in country Z. The marriage was valid according to the law of X but invalid by the law of Y. In the meantime, the parties are temporarily resident in Nigeria where the essential validity of the marriage arose for determination. In such circumstances, it is well accepted by all the protagonists of the theory of matrimonial domicile that neither logic nor reason supports the application of the law of country Z, the intended matrimonial home. Professor Cheshire, however, suggests that in such a situation "capacity to marry is governed by the law of the husband's domicile" i.e. the law of country X. This suggestion is untenable since it disregards the law of the country of

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70. (continued) recognition to a foreign incapacity if such recognition will be unconscionable.

71. [1959] E.A. 568.

72. Ibid., at p. 575.

domicile of the wife, the interest of which is equally as important as that of the husband. The logical solution would be to apply the antenuptial leges domicilii of both parties.

It seems clear that somewhat similar line of reasoning led the Royal Commission on Marriage and Divorce in England to adopt the doctrine of matrimonial domicile as only an alternative rule to govern the essentials in marriage. For according to unanimous report of the Commission in this respect

> "There are circumstances in which it would in our opinion be unfair to apply the personal law or laws of the parties at the time of the marriage ... We think that ... the validity of a marriage should in the last resort depend on the law of the country in which the matrimonial home has been established, because the status of marriage pre-eminently affects society in the country where the parties live together as husband and wife. That country represents what has been called the 'true seat of the marriage relation', and it seems socially undesirable that a union which is there regarded as not detrimental to the community should be pronounced void, merely because one or other or both of the parties were formerly connected with a country in which a different view prevails." 73

The Commission, therefore, recommended that

> "where a marriage is alleged to be void on a ground other than that of lack of formalities, that issue should be determined in accordance with the personal law or laws of the parties at the time of the marriage (so that the marriage should be declared void if it is invalid by the personal law of one or other or both of the parties); provided that a marriage which was celebrated elsewhere than in England or Scotland should not be declared void if it is valid according to the law of the country in which the parties intended at the time of the marriage to make their matrimonial home and such intention has in fact been carried out." 74

In making an exception preventing the law of the matrimonial domicile being applied in respect of marriages celebrated in England and Scotland,[75] the Royal Commission was influenced by the possibility of a marriage celebrated in these two countries, in

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73. Cmd. 9678 (1956) para. 889.

74. Ibid., Para. 891 and p. 395. Emphasis supplied.

75. Ibid., Para. 890.

contravention of their positive prohibitions against marriage, being validated under a foreign matrimonial domiciliary law.

The same objection levied against the decision in Sottomayor v. De Barros (No. 2) is equally applicable here. The recommendation, if accepted, will still result in an insular principle in that it ensures that the positive prohibitions imposed by the English or Scottish law regarding marriage are enforced by the English Courts in applying the law of a foreign matrimonial domicile of the parties, when the marriage took place in England or Scotland; whereas a foreign incapacity on one or both of the parties must be ignored by English law when England or Scotland is the matrimonial domicile of the parties regardless of the fact that such marriage was celebrated in a country whose impediments were not complied with.

If theory be allied to common sense and a desire to make principles work, we should follow the Royal Commission's recommendation in making the doctrine of the matrimonial domicile an alternative proposition for determining the capacity of the parties to marry. We should, however, disagree with that report in restricting the doctrine to marriages celebrated outside Nigeria and therefore state the rule of substantive validation of marriage in the following terms:

> The essential validity of a marrige is governed by the personal law of each party at the time of marriage; provided that a marriage should not be declared void if it is valid according to the law of the country in which the parties intended at the time of marriage to establish their matrimonial home and such intention has in fact been carried out.

C. POLYGAMOUS MARRIAGES

If in classifying the legal requirements of marriage into formalities and essentials, the two being cumulatively governed by different choice of law rules, many problems of a conflictual nature are encountered in respect of monogamous marriages, the consideration of the intra-national or international validity of polygamous marriages is beset from the outset with difficult problems of a more perplexing nature.

Although polygamy, whether actual or potential, is a form of marriage known to more than half of the world's population, it does not enjoy universal recognition among nations of the world as a monogamous marriage. Most countries to whose public policy recognition of this institution was initially abhorrent, despite their increasing recognition of it for certain purposes, still prohibit its celebration within their national boundaries and deny its validity for all purposes if so celebrated. It is doubtful if this attitude will change with time.

Even in Africa and Asia where the institution of polygamy is predominant, the rules for its formation and dissolution are ever-changing, not often precisely defined, and consequently, not easily ascertainable as already noted. They vary not only from country to country but also from community to community within the same county. Hence a significant difficulty for the Nigerian private international law, if the formalities of polygamous marriage are to be governed by the lex loci celebrationis as the usual rule, lies in the fact that the ceremonies of this form of marriage, unlike those of monogamous marriage, are not uniform. Also, its formation is almost exclusively the concern of the parties and their respective families. Hence the apt

description of the marriage as more of an alliance between two family groups than a union between two parties.

In sharp contrast to this is the identity in formal characteristics of a monogamous marriage. Thus to give an instance of this identity, the solemnization of a monogamous marriage follows almost the same sequence of ceremonies in all the world over. As a rule, an attendance before an officiating registrar of marriages, or a duly authorised minister of religion, preceded by such preliminaries as filing of due notice or publication of banns, settles the formal aspects of such marriage.[76] This universal mode of celebration, as pointed out by Schmithoff,[77] accounts for the easy delegation of the formalities of monogamous marriage to the lex loci celebrationis since there is less theoretical difficulty in testing the formal validity of such marriage by the law of the country where it was celebrated. As an added advantage, this proceedure facilitates the easy proof of the marriage, besides the fact, though less significant, that it also makes for the easy determination of the country where the marriage was celebrated and which law should be applied to govern the formal validity of such marriage.

Since this uniformity in the mode of marriage licensing is lacking in respect of polygamous marriage in Nigeria and most other countries permitting polygamy, the determination of the appropriate choice of law rules for testing its validity must involve some modification so as to take account of this peculiar problem of polygamous marriage. In this respect, brief mention must be made of the fact that owing to the diversity of customary

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76. An obvious exception to the general statement is the "common law" marriage.

77. A Textbook of the English Conflict of Laws (3rd ed.) pp.306 and 317.

laws on marriage even within a single state in Nigeria, it is considered unnecessary to differentiate between intra-national and international validity of polygamous marriage. But before we proceed to consider the appropriate choice of law rules, it will first be necessary to state the legal requirements of the marriage with a view to classifying them into formalities and essential.

(i) Legal Requirements of a Nigerian polygamous marriage

The following are, in brief, the legal requirements of a polygamous marriage under the municipal law, although as will be discovered later on, the effect of some of them on the validity of the marriage is not the same under the different systems of customary and moslem law operating within the country.

(1) Age of Marriage: This may be determined by reference to calendar years.[78] But by far the most universal criterion for determining whether a person has attained marriageable age in the warm climate of Nigeria is puberty of the person, though in practice he usually waits until a more mature age before contracting a marriage.[79] As can be expected, no uniformity exists in this respect.

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78. As in all jurisdictions in Eastern Nigeria where by virtue of s.3(1) of the Eastern Nigeria Age of Marriage Law, 1956, the age of marriage is fixed at 16. Also, the Declarations of Native Law and Custom of Idoma (N.A.L.N.63 of 1959), Borgu (N.A.L.N.52 of 1962) and the Biu federation (N.A.L.N. 9 of 1964) each stipulates 12, 13 and 14 years respectively.

79. Puberty is the criterion for determining the age of marriage under the Moslem law which is operative in most jurisdictions in Northern Nigeria, and also according to the Declaration of the Tiv Native Law and Custom on Marriage and Divorce; Ma'aji Isa Shani, Digest of Maliki Family Law, p.3; and N.R.L.N. 149 of 1955.

(2) Parental Consent: As a rule, the consent of parents or a guardian is a legal prerequisite to the marriage of an infant, whether male or female. However, in the Western and the Mid-Western states, the court may dispense with such consent on the part of the female party who is above the age of 18 if consent is unreasonably withheld by her parents or guardian.[80] After majority or shortly before, the male party may marry without the consent of his parents or guardian since, if he is economically independent, he is able to provide the necessary dowry or bride-price (for which see below).[81] In the case of an adult woman, especially under the Maliki school of Islamic law applying in most jurisdiction in Northern Nigeria, the fact of her majority does not necessarily dispense with parental consent which is invariably signified by the acceptance by her parents or guardian of the dowry or bride-price payable on her marriage.

(3) Consent of Parties: This had no legal significance under the traditional law, the fact that the suitor and his parents were agreeable to the woman's parents, rather than to the woman herself, being the determining factor. There is no doubt that this situation strikes at the root of marriage. Hence consent of parties has now attained the position of

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80. Marriage, Divorce and Custody of Children Adoptive Bye-laws, s.5 (W.R.L.N. 456 of 1958) which has been adopted by over 30 District Councils in the Western State and few others in the Mid-Western State.

81. Re Sapara (1911), 1 Ren. G.C.Rep. 605 at pp.607-8; See also the Declarations of Native Law and Custom on Marriage and Divorce referred to in note 78 above.

a legal requirement of a polygamous marriage in most jurisdictions in Nigeria.[82]

(4) Payment of Bride-Price or Dowry: As has already been observed, this time-honoured legal requirement of a polygamous marriage is inseparably bound with parental consent. Its non-payment not only makes the marriage invalid, its non-acceptance also signifies the total opposition of the woman's parents to the proposed marriage between the parties. In most jurisdictions, the payment is usually in cash[83] coupled with or in substitution for some symbolic articles such as clothing, foodstuffs or kolanuts. Although the cash payment may be waived by the person legally entitled to receive it, nonetheless, something symbolic must still be paid before the validity of the marriage can be sustained.[84]

(5) Prohibited Degrees of Relationship: Like all systems of Marriage law, a further legal prerequisite of a polygamous marriage is that the parties must not be within certain degrees of consanguinity, affinity, adoption or other relationships. Although this impediment to marriage is often not clearly stated[85]

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82. Savage v. Macfoy (1909) 1 Ren.G.C.Rep. 504; Kasunmu & Salacuse, op.cit., at pp.75-76; Obi, op.cit., p.164.

83. For example, the Marriage, Divorce and Custody of Children Adoptive Bye-laws of the Western State provides for cash payment of £35 at the maximum, while the Limitation of Dowry Law, 1956 of Eastern Nigeria stipulates a maximum payment of £30.

84. Kasunmu & Salacuse, op.cit., p.79.

85. See however s. 13(4) of Eastern Nigeria Adoption Law, 1965 which provides that since an Adoption Order creates under the Law a relationship of parent and child between the adopter and the child, the parties thereto are deemed to be within the prohibited degree of consanguinity for purposes of marriage.

as in a monogamous marriage, the degree of relationship within which a person may not marry is generally believed to be more extensive than such impediment relating to monogamous marriage. For example, under the Moslem Maliki law, a foster relationship is regarded as having created an absolute impediment to a marriage between the relatives by blood or affinity of the foster mother, on the one hand, and the foster child and his issue on the other.[86]

(6) Symbolic Delivery of the Wife: Until the High Court's decision in Re Soluade and Deckley[87] it was generally believed that the formal handing over of the bride to the bridegroom's house was not more than a ceremonial feature of a customary marriage which had no legal significance. But in that case, Ames, J., held that symbolic delivery or the "giving away" of the bride, as it is often termed, is a legal requirement for the validity of a polygamous marriage in Lagos. Earlier on, Osborne, C.J., in Re Sapara,[88] following his decision in Savage v. Macfoy[89] had classified the ceremony of, as he termed it, "the accompaniment of the bride to the house of her husband" as only a social feature of customary marriage in the same category as "the reception of the bride

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86. Ma'aji Isa Shani, Digest of Maliki Family Law, p.4.

87. (1943), 17 N.L.R. 59.

88. (1911), 1 Ren. G.C. Rep. 605.

89. (1909), 1 Ren. G.C. Rep. 504.

on her arrival at the house" or "the presentation of gifts to her companions".[90] According to the Chief Justice, "the actual legal essentials of native marriage are as laid down in Savage v. Macfoy, viz. first, the consent of the girl and her family, and secondly, the presentation and acceptance of the ano"[91] i.e. the bride-price. To these must be added such requirements as the "native prohibited degree of consanguinity" to which the Chief Justice adverted in his judgment[92] and age of marriage as we have seen above.

When it is recalled that Osborne, C.J., statements in Savage v. Macfoy and Re Sapara were also concerned with the ascertainment of the legal requirements of a customary marriage in Lagos, Re Soluade and Beckley might be considered as wrongly decided since it failed to follow previous decisions of the Supreme Court. The fallacy of such argument, however, lies in the fact that while the statements of the law in the two Supreme Court's decisions were obiter, Re Soluade and Beckley was the only case so far in which the legal significance of the ceremony of leading away of the bride had been raised as an issue. It thus constitutes a better authority than the two Supreme Court's decisions.

While such ceremony exists in most other systems

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90. Re Sapara (1911) I Ren. G.C. Rep. 605 at pp.610-611.

91. Ibid., at p. 608.

92. Ibid., at p. 612.

of customary law of marriage in Nigeria, its legal effect in those jurisdictions is still a matter of conjecture among legal writers.

As regards the Yorubas of Western Nigeria, Dr. Coker would seem to regard the formal handing over of the bride as irrelevant to the validity of the marriage[93] while Dr. Elias, on the other hand, takes a different view. He states that the payment of the bride price is the deciding factor,

> "but its settlement does not clothe the contract with legal validity ... it is the formal handing over of the girl to her husband at his abode that really completes the marriage." 94

This is also the view of Dr. Obi whose statement of the law among Southern Nigerian systems of customary law is that the

> "final essential for a valid customary marriage is what may be called the 'giving away' of the bride, for want of a better term". 95

In similar vein is the view of Alhaji Suka who states that as a result of modification of Moslem law by customary law in Northern Nigeria, the law now

> "demands that although the marriage has been duly tied by the Imam and witnessed by the public at large, the wife does not become his until he goes or sends his relatives to bring the wife to the matrimonial home." 96

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93. Coker, Family Property Among the Yorubas (2nd ed.) pp.262 and 272. See also Ajisafe, Laws and Customs of the Yorubas, p.55.

94. Elias, Nigerian Legal System, p.297.

95. Obi, op.cit., p.180.

96. Alhaji Suka, I Journal of the Centre of Islamic Legal Studies, Ahmadu Bello Univ., Zaria, No. I, p.13.

In other jurisdictions, however, it has been settled beyond doubt that a symbolic delivery of the bride to the bridegroom's house has no legal effect whatsoever for customary marriage. Thus, for example, the Declaration of Idoma customary law relating to marriage and divorce provides that

> "A marriage shall be deemed to be contracted upon presentation to the father or guardian of the customary betrothal gift: Provided that his explicit consent is given at the time of presentation." 97

Similarly provided are the Declarations of Borgu and Biu customary laws of marriage.[98]

(7) Registration: The policy consideration underlying the statutory innovation in most jurisdictions in Nigeria in relation to the registration of a customary marriage is basically the same.[99] Except in one jurisdiction, registration of customary marriage is merely designed to facilitate the proof of such marriage. Even though all the statutory provisions prescribe penalties for its non-registration, its non-observance does not affect the validity of the marriage which is considered already valid as from the time of its conclusion provided all the legal requirements considered above had been complied with.

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97. N.A.L.N. 63 of 1959, Schedule s.4.

98. N.A.L.N. 52 of 1961, Schedule s.4, N.A.L.N. 9 of 1964, Schedule s.3(1).

99. See Registration of Marriage Adoptive Bye-Laws Order of Western Nigeria, 1956 (W.R.L.N. 4 of 1957) which has been adopted in most District Councils in the Western State; The Hadeija Native Authority (Reporting of Marriages) Rules, (K.S.N.A.L.N.1 of 1967); Borgu Native Authority (Reporting of Marriages) Rules, (N.A.L.N. 72 of 1967) and the Igala Native Authority (Reporting of Marriages) Rules (C.W.S.N.A.L. N.5 of 1968).

In fact, the period within which particulars of such marriage must be registered or "reported" for registration varies from seven to thirty days.

A provision which has a different resultant effect on the validity of the marriage is the Tiv Declaration of customary law on marriage which states that

> "A marriage according to Tiv Native law and custom between members of the Tiv tribe who are subject to the jurisdiction of the Tiv Native Authority is valid if ... the marriage has been registered by a native court." 1

In so far as the marriage is invalid unless it is registered, registration in this jurisdiction becomes a legal prerequisite to the validity of the marriage.

It will be pertinent to point out in conclusion of our discussion on legal requirements of a polygamous marriage that other impediments of such marriage affecting a party subject to Moslem law are those relating to "equality of marriage". Under the Moslem law, a husband is required to be the equal of his wife as regard race, religion, general character (whatever that may mean), trade or profession. But as pointed out by Shani in his Digest of Maliki Family law[2] this is not an absolute impediment to marriage e.g. like payment of bride-price or parental consent. The effect of the breach of any of the criteria of marriage equality is no more than affording the wife or her marriage guardian a right to apply for the dissolution of the marriage.[3] A close analogy would appear to be found in a voidable

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1. N.R.L.N. 149 of 1955. Schedule s.2(e).

2. (Ahmadu Bello Univ. Zaria) p.7.

3. Anderson, op.cit., p.206 seems to have incorrectly stated that these impediments make the marriage null and void.

monogamous marriage which may be avoided on the ground of impotence or non-consumation of the marriage. In both cases, the marriage is perfectly valid until avoided. These so-called "essentials" of a Moslem marriage must therefore be distinguished from the ones considered above.

(ii) Classification of legal requirements

As we have just observed above, the legal requirements of a polygamous marriage in Nigeria possess some common factors with those of a monogamous marriage. A comparison of the marriage requirements reveals however that they differ considerably in certain respects. The key question now to be considered is whether the legal requirements of a polygamous marriage in Nigeria are such in its contemporary development as to justify a scientific classification into formalities and essentials. This point is not merely academic since a polygamous marriage like a monogamous one may be void for lack of form or other requirements of marriage touching the essence of the marriage, e.g. lack of age or consanguinity or affinity. It will be necessary therefore to examine the theories of classification evolved by authorities in this field so as to discover which of these theories is applicable for the characterisation of the legal requirements of a polygamous marriage.

The first of the theoretical approaches to making a distinction between the formalities and essentials of a marriage may be described as "the resultant effect" theory. Foote states the theory in the following terms:

> "The difference between essentials and forms in such a matter would naturally seem to be that between prohibitions which forbid and prohibitory directions

which merely impede the marriage."[4]

In other words, if the non-observance of a particular requirement of marriage renders the marriage absolutely void (absolute impediments), such requirement should be regarded as going to the essence of the marriage, whilst a prohibition which does not invalidate a marriage contracted in violation of it (directory impediments) should be classified as formalities.[5] This mode of classification is not often insisted upon in modern times. But whatever force the theory may have, it is our submission that it is wholly inapplicable to a customary marriage since, in effect, a violation of any of the requirements listed above has a fatal effect on the validity of the marriage in the jurisdiction where it applies.

A second theory is that espoused by Dr. Sykes which contemplates the separation of the contract of marriage from the ceremonial or ritual aspects.[6] According to this test, if a requirement pertains to the contract of marriage, it should be categorised as an essential; whilst if it appertains to the ceremony of marriage, whether it merely postpones or avoids it, it should be regarded as a formality of the marriage. Despite the superficial attractiveness of this approach, it completely breaks down as a test for determining the vital question as to whether the consent of parents or other individual prescribed by all systems of customary law is an essential or a formality. For in dealing with parental consent, Dr. Sykes resorts to the

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4. Foote, A Concise Treatment on Private International Law, (5th ed. by H. L. Bellot 1925) p. 123.

5. See also Beckett, "Classification in Private International Law" 15 B.Y.B.I.L. (1934) 46 at p.80; Schmitthoff, op.cit., p.318; Rabel, Vol.I, p.263.

6. Sykes, "The Formal Validity of Marriage", 2 I.C.L.Q. 78.

resultant effect theory which he had vigorously criticised in determining whether a requirement for parental consent pertains to the essence of the marriage contract or relates only to the ceremonial aspect of it. Thus he observes that

> "if a marriage law states that the parties shall not marry unless the consent of parents shall be obtained or that a marriage between certain persons shall be void unless such consent be obtained ... It seems to be clear that such a requirement does go to essentials, it affects the quality of the offer and acceptance, it makes the contract conditional instead of being absolute. On the other hand, if the consent requirements are not absolute"

this should relate to formalities.[7] This approach appears an improvement on the first theory but by far the best of these solutions seem to be that recently adopted by Lord Merriman in the English case of Apt v. Apt,[8] the functional test.

On the authority of that case, the test is stated by Professor Graveson as follows:

> "Whether or not any requirement of marriage is an essential or a formality depends on the degree of intensity of the public or social interest which it embodies and expresses. Those matters which are regarded as vital to the maintenance of an acceptable standard in the matrimonial and family relations of any given society ... will be regarded as essentials of the marriage ... while matters of less social interest ... will be treated as pure formalities". 9

Applying this test, the following requirements of a polygamous marriage may, for purposes of the municipal law, be regarded as the essentials of the marriage viz. Age, Parental consent, consent of the parties, consanguinity or affinity and bride-price; while such requirements as the installation of the bride in the

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7. Sykes, I.C.L.Q.78 at pp.86-87.

8. [1947] P.127, [1948] P.83 (C.A.).

9. Graveson, op.cit., 6th Ed., p.262.

husband's house and registration of the marriage, where applicable, may be classified as formalities of marriage.

(iii) Formal validity of a polygamous marriage

It has been submitted that only symbolic delivery of the bride and registration of the marriage may logically be regarded as the formalities of a polygamous marriage under Nigerian conflicts rules. In other words, that a polygamous marriage does contain certain legally recognised formalities as does a monogamous marriage. To proceed, however, from this hypothesis and state that the formalities of a polygamous marriage must comply, exclusively, with the lex loci celebrationis will not always be satisfactory in its practical application. It may be here recalled that celebration of a marriage in a polygamous form is not permitted in most countries of Western civilization. For example, it is stated in Dicey and Morris[10] that a

> "marriage celebrated in England in accordance with polygamous forms and without any civil ceremony as required by English law is invalid, whatever the domicil of the parties".

While this difficulty may be overcome by the rule of mutation, i.e. by adopting a civil form of ceremony for the conclusion of the first of an actually polygamous marriage, so that the polygamous character of the marriage is determined by the Nigerian personal law of the parties, this expedient in respect of subsequent marriage by the same man will undoubtedly entail a conviction for bigamy. Besides, the policy of the Nigerian law should not be to advocate or encourage the breach of other

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10. op.cit., 8th ed., Rule 34, p.280. See also s.6A of the Australian Matrimonial Causes Act, 1959-1965, the effect of which appears to be inconsistent with the decision of the Australia High Court in Hague v. Hague [1962] 108 C.L.R.230, where it was held that a polygamous marriage celebrated in Australia according to a polygamous form prescribed by the personal laws of the parties at the time of celebration is valid, notwithstanding that the Australian marriage was a second one by the male polygamist.

countries' laws apart from the personal inconvenience such breach will bring for the party concerned.

Moreover, the establishment of Marriage officers in respect of polygamous marriages in Nigerian consular offices or embassies abroad,[11] on the basis that insufficient facilities exist for the conclusion of polygamous marriages abroad, desirable as this will be, would not seem to justify delegating the formalities of a polygamous marriage to the law of a foreign country not permitting polygamy. No doubt, the authorities of the country of solemnisation may not object to the celebration of such marriage in the country if it is between parties whose personal law or laws allows polygamy,[12] nevertheless, by the rule or fiction of public international law that such foreign parties have contracted such marriage in extraterritorial territory, the law applied for determining the formal validity of such consular marriage will be exclusively Nigerian law and not the lex loci celebrationis.

Secondly, as regards foreign countries permitting polygamy, the nature of polygamous marriage formalities, requiring as it often does, the involvement of family members of the parties (except in few countries like Tanzania and Southern Rhodesia where the registration of a polygamous marriage constitutes the only formality of such marriage) would seem to make it impossible for foreign parties resident in such countries without their respective family members to employ such marriage formali-

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11. Kenya has recently adopted this approach. See the Marriage (Amendment) Act, 1966, No.26 of 1966. The Act was recently discussed by Cretney, "Some Problems in the Marriage Laws of Kenya", 3 E.A.L.J. (1967) 1

12. For example, in Australia, a polygamous marriage celebrated between persons whose personal laws permit polygamy before a consular officer is regarded as valid, notwithstanding the invalidity according to the law of Australia where the marriage is celebrated. For the position in England as similarly stated, see, Foster in 65 Recueil des Cours, p.444.

ties in contracting their marriage.[13]

Even in Nigeria, the position of customary marital laws would seem not to permit foreign parties whose personal law or laws permit polygamy to comply with the formalities of such marriage without sacrifice of principle. For according to case law [14] and the unanimous opinion of legal writers on this point, the essence of the requirement of symbolic delivery of the bride to the husband's house which, under the test applied above, will constitute one of the formalities of customary marriage in Nigeria, is that the female party is led at night-fall by members of her family to the husband's house,[15] or alternatively, the handing over may be made at the house of the female party by members of her family, the husband and/or his relatives going there to receive her.[16] One question may be asked in this connection. Can the family members' involvement in this respect be dispensed with when the parties are foreigners whose relatives are not present in the forum? There is no direct authority on this point but commonsense and justice would seem to demand a positive answer to the question posed. International or even intranational transactions cannot, it is submitted, be based on an idea of family cohesion which underlies this ceremonial aspect of a customary marriage.

As regard registration which constitutes the second formal

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13. See e.g. Cotran, Restatement of African Law, Vol.1, The Law of Marriage and Divorce in Kenya, for the bewildering variety of marriage ceremonies in the country.

14. Re Soluade and Beckley (1943) 17 N.L.R. 59.

15. Elias, Nigerian Legal System, p.292.

16. Obi, op.cit., pp.180-181.

requirement in one locality in Nigeria, it is only required when the two parties are "members of the Tiv tribe who are subject to the jurisdiction of the Tiv Native Authority".[17] It becomes obvious that the requirement is not obligatory on parties all or one of whom is not a member of the Tiv tribe, even though subject to the jurisdiction of the Native Authority.

Owing to the peculiar nature of the formalities of a polygamous marriage and the lack of universal support for its formation under most systems of municipal law as have been observed above, it is submitted that the only way by which parties could at present contract a polygamous marriage outside the state in which they live with their family members, is for them to consent to become husband and wife, preferably in the presence of witnesses. This was the rule under the Maliki school of Islamic law obtaining in most states of Northern Nigeria, before it was modified by the indigenous customary law. Thus, under the Maliki version of the Moslem law, the only requirement imposed for the celebration of a Moslem marriage is that the parties should be mutually agreed to become husband and wife, provided that such voluntary agreement is duly publicised, i.e. concluded in the presence of at least two witnesses. Often than not, such agreement is ideally oral. There is no legal obligation for the intervention of a public official although such marriage is in practice concluded by a religious leader.[18] When the system of registration of polygamous marriages, which is now discretionary on the part of the parties in most juris-

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17. N.R.L.N. 149 of 1955, Schedule s.2.

18. Shani, op.cit., pp.2-3; See also, Ahmadu Suka, 1 Journal of the Centre of Islamic Studies, (Zaria, Ahmadu Bello Univ.) No. 1, p.13.

dictions in Nigeria, is perfected and made imperative, then it could be provided that such marriages celebrated in this form abroad should be registered at the place where the parties are domiciled in Nigeria.

With this situation in mind, the choice of law rules governing the formal validity of a polygamous marriage may be framed as follows:

> A marriage celebrated in accordance with polygamous forms shall be valid as regards formalities if:
>
> (a) Its celebration conforms to the requirements prescribed by the law of the place of celebration with respect to the solemnization of such marriage; or
>
> (b) Its celebration was in accordance with the form of solemnization prescribed by the law of domicile of each party at the time of the marriage, or the law of the place in which the parties intended at the time of the marriage to establish their matrimonial home and such intention has in fact been carried out.[19]

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19. A near analogy to rule (b) is contained in Art. 10(3) of the Ethiopian Code of the Conflict of Laws, cited from Sedler, The Conflict of Laws in Ethiopia, (Addis Ababa, Haile Sellassie I Univ. 1965), and Art. 13 of the German Code, EGBGB. Under these two articles, the lex loci celebrationis is only an alternative to the personal law of each of the parties as regards the law which governs the formal validity of marriage. In respect of the German provision, see further, Cohn in Manual of German Law, Vol.II (London, H.M.S.O. 1952) p.23.

Another similar rule to the one suggested in (b) above, is the conception of common law marriage, which operates in almost all common law countries. Under this rule, a monogamous marriage is considered validly celebrated if it was contracted according to the common law i.e. by the parties merely agreeing to be husband and wife, in a place where there is no local form of solemnizing a marriage, or where there is insuperable difficulty in employing the form obtaining in the local jurisdiction. See Catterall v. Catterall (1847) 1 Rob.Ecc.580; Limerick v. Limerick (1863) 32 L.J.P.92; Phillips v. Phillips (1921) 38 T.L.R.150; Wolfenden v. Wolfenden [1946] P.61; [1945] 2 All E.R.539;

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(iv) Essential validity of a polygamous marriage

The Statutory Choice of Law Rules

As the introduction to this chapter has explained, there are several systems of customary law in the Nigerian federation. Consequently, the customary law relating to the formation of marriage varies from one ethnic locality to the other. This variety as to details is often not between one state and another. It may be within a single state of Nigeria. An example of these diversities has been noticed in our statement of the requirement concerning the age of marriage, which starts at puberty in several jurisdictions and progresses in an ascending order to 16 in some other places. Another instance is that in some ethnic localities, the prohibited degree of marriage extends to several generations whereas in others, a marriage may be

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19. (continued) Isaac Penhas v. Tan Soo Eng [1953] A.C.304; Taczanowska v. Taczanowski [1957] P.301, and also, the two Australian cases of Fokas v. Fokas [1952] S.A.S.R. 152 and Maksymec v. Maksymec [1954] W.N. (N.S.W.) 522 where it was stated that the doctrine of the common law marriage should be applied to determine the formal validity of marriage only when it is recognised by the lex domicilii of the parties at the time of the marriage, or the lex domicilii of the husband alone at the relevant time, if it is different from that of the wife. In Fokas v. Fokas, Myers, J., remarked: "I cannot see any justification for adopting the English common law as the criterion of the [formal] validity of a marriage in a foreign country between persons who are neither British by Nationality or domicile nor subject to the law of any part of the British Commonwealth. It would indeed be most unjust to do so." The view expressed in the two Australian cases is shared by some writers on private international law in the common law world, e.g. Beckett, 48 L.Q.R. 341 at pp.366 and 367; Sinclair, 31 B.Y.B.I.L., 248 at p.254; Mendes da Costa, 33 Aust. L.J. (1959) 72 at pp.80 et seq., and in 7 I.C.L.Q. p.217. Indeed, as far back as 1932, it has been suggested by Sir Eric Beckett that the English private international law should, by analogy, adopt the doctrine of the common law marriage for sustaining the formal validity of a marriage contracted in polygamous forms in England, if the parties to such a marriage are subject to a system of law which permits polygamy. But contra: Dicey and Morris, op.cit., 8th ed. p.281; see also, Morris, 66 Harv. L.R. 961 at p. 982.

validly contracted between a half-brother and his half-sister.[20] Furthermore, a prohibited degree of relationship within which a person may not marry in one locality may be totally unknown in the others, for example, the impediment on marriage between persons within foster relationship existing under Moslem law in parts of the Northern Nigerian states. In view of this diversity of marital and other customary laws, it is not surprising that most of the former Regions of Nigeria have deemed it necessary to enact choice of law rules that should be applied where the factual situation of a transaction has some significant connection with more than one system of customary law within Nigeria. These statutory choice of law rules have been extended to the new states created out of the former Regions by the Constitutional instrument creating the states, with the result that the rules become part of the laws of such states.

These statutory provisions are primarily directed to customary courts, except in the Western and the Mid-Western states where the High Courts are expressly directed to apply the same choice of law rules provided for the customary courts. If the statutory choice of law rules are adequate for determining the intranational validity of polygamous marriages, there would seem to be no reason why they should not be adopted by the High Courts for private international law purposes not only because all the High Courts are enjoined by general provisions in the High Court Laws to apply customary laws but also of our submission in chapter one that one of the factors which the superior courts should take into consideration in developing Nigerian

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20. For example, as in the Ekoi Customary law, see below.

private international law is that customary law is part of the substantive sources constantly remaking the body of this branch of the law. These statutory choice of law rules are not the same in all the Nigerian states. Therefore in considering their adequacy with regard to the essential validity of polygamous marriages, it will be necessary to discuss them according to the group of states operating uniform rules.

The Western, the Mid-Western and the Lagos States

The relevant provision in this group of states is section 20(3) of the Western Nigeria, Customary Courts Law, 1959.[21] As regards the Western and the Mid-Western states, it is provided that where the High Courts of these two states decide that customary law is applicable in a conflictual situation, the courts should apply section 20 of the Customary Courts Law.[22] But in the Lagos state, the application of the section is confined to the Customary Courts in certain parts of the state.[23]

Section 20(3) of the Western Nigeria, Customary Courts Law is couched in the following terms:

"(a) in any civil causes or matters where -

(i) both parties are not natives of the area of jurisdiction of the court; or

(ii) the transaction the subject of the cause or matter was not entered into in the area of the jurisdiction of the court; or

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21. Cap. 31, Laws of Western Nigeria (1959 ed.). The Law was made applicable to the Mid-Western State by the Mid-Western Region (Territorial Provisions) Act, No.19 of 1963, s.2; and to the Lagos State, by the States (Creation and Transitional Provisions) Decree, 1967, s.1(5) and the Lagos State (Applicable Laws) Edict, No.2 of 1968.

22. See the High Court Law, Cap.44, Laws of Western Nigeria, (1959 ed.) s.12 (4).

23. By the Lagos State (Applicable Laws) Edict, No.2 of 1968.

(iii) one of the parties is not a native of the area of jurisdiction of the court and the parties agreed or may be presumed to have agreed that their obligation should be regulated, wholly or partly, by the customary law applying to that party,

the appropriate customary law shall be the customary law binding between the parties.

(b) in all other civil causes and matters the appropriate customary law shall be the law of the area of jurisdiction of the court."

Some of the terms used in this enactment need some explanation. By section 2 of the Customary Courts Law, "cause" is defined to include "any action, suit or other original proceeding between a plaintiff and a defendant and also any criminal proceeding". "Matter" is defined to include "any proceeding in a court not in a cause". Therefore, a "civil cause or matter" as used in section 20(3) denotes any action, suit or other original proceeding between the parties to a civil case, as opposed to a criminal one. Consequently, the phrase "civil cause and matter" embraces such matters as a nullity suit brought by one spouse to annul a customary marriage for failure of the other to observe a marriage prohibition or requirement; a divorce cause; an action in tort; and a proceeding to enforce a contract, etc. Land and succession matters are excluded from the ambit of section 20 (3) since they are separately provided for in section 20 (1) and (2) of the Law.

A "native" for the purpose of the Law, is defined by subsection 6 of section 20 as a person who is a member of a community indigenous to the area where a customary court exercises its jurisdiction. Therefore, a non-native means a person who is not a member of a community indigenous to the area of jurisdiction of the court, however, excluding persons who are not

"Nigerians"[24] since a customary court has no power to adjudicate over persons who are not Nigerians.[25] Whether the High Courts, in applying section 20 of the Customary Courts Law, will consider themselves bound by the provision of section 17 of the Law as regards non-exercise of adjudicatory powers over persons who are not Nigerians is not clear.

With the above definitions and explanations, the only effect of section 20 (3) which may be regarded as clear are as follows:

In any civil action, suit or proceeding

(a) Where one or all the parties are natives of a community indigenous to the area of jurisdiction of the court, the applicable law shall be the customary law of such ethnic community: Section 20 (3) (b).

(b) Where the parties agreed or may be presumed to have agreed that their obligations should be regulated, wholly or partly, by the customary law of the party who is not a native of a community indigenous to the area of jurisdiction of the court, "the customary law applying to" the non-native shall be applied. Section 20 (3) (a) (iii).

(c) In two other cases,

(i) Where both parties are not natives of a community indigenous to the area of jurisdiction of the court, or

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24. A "Nigerian" is defined by s.2 of the Western Nigeria, Customary Courts Law, as a person whose parent or parents were members of any tribe or tribes indigenous to Nigeria and the descendants of such persons.

25. Western Nigeria, Customary Courts Law, s.17.

(ii) Where the transaction the subject of the action, suit or proceedings, was not entered into in the area of jurisdiction of the court,

then, in such situations, the courts must apply "the customary law binding between the parties". Section 20 (3)(a)(i) and (ii)

Thus while it is clear that the customary law of the area of jurisdiction of the court applies in situation (a) and that the parties may agree, or be presumed to have agreed, on the relevant "foreign" customary law in situation (b), the section is silent as to how the "customary law binding between the parties" in the two situations listed in (c) should be ascertained. It must be pointed out at once that domicile and nationality are not relevant tests since a customary court in this group of states has not the power to apply common law concepts or provisions of a statute which it has not been expressly authorised to apply.[26] Nonetheless, the category of connecting factors is not close. The test may be one of religious adherence of the parties concerned, or their membership of an ethnic community outside the area of jurisdiction of the court. On the analogy of the rule contained in (a) above, it would seem that the test of "ethnic identity" should be applied. However, if the community of which the parties are members are different, and different solutions are provided by the laws of such communities for the resolution of the matter in dispute, then the section offers no guidance and the courts are left to devise appropriate choice of customary law rules.

These statutory provisions, as has been shown, are formulated with reference to civil causes and matters, however, excluding

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26. Ibid., s.19.

land and succession suits. The section therefore constitute the choice of law rule applicable in actions concerning, for example, nullity of marriages, divorce, contract, tort, etc. A pertinent question that must be asked in this connection is whether the provision is equally applicable to an issue, e.g. validity of marriage, which arises as an incidental matter in a suit as distinguished from a main cause of action. It will perhaps be artificial to resort to such fine distinctions in interpreting this clause, but it must be pointed out, as the first objection to this provision, that the position would have been clearer were the provision made with reference to an issue rather than in relation to a cause of action.

A second and more serious objection is that the courts are required to apply a subjective test in all cases in determining the law binding between the parties. For according to section 20 (3), sub-section (a) of the Customary Courts Law, when one of the parties is not a native of the area of the court's jurisdiction and the parties agreed or are presumed to have agreed that the customary law of the non-native should regulate their obligation, then the appropriate law shall be the customary law binding between the parties. The enactment of this statutory choice of law rule must, therefore, be presumed to have been made on the fundamental assumption that parties to a transaction must always act reasonably. As regards the validity of a customary marriage, the rule invests parties with an unlimited freedom in choosing the law of the place with reference to which the validity of their marriage must be tested. In other words, if the parties to a marriage decide not to act reasonably, (indeed, to adopt the statement of one jurist, love and hate know no legal bars)

a subjective interpretation of the law binding between the parties will, in most cases, give statutory licence to parties to contract their marriage in evasion of the prohibitions of the domestic law however stringent they may be. The rule therefore appears to have ignored the social interest of the state in regulating and maintaining the institution of marriage.

In illustration of the undesirable consequence of this rule, the following hypothetical case will be considered:

> W. an Ekoi woman, subject to the Ekoi customary law, is a half-sister of H, a Yoruba, subject to the Western Nigeria Customary law. H. and W. contracted a marriage in an Ekoi town according to the customary law of that place. Three months later, the parties settled in Ibadan in Western Nigeria. By the Ekoi customary law the marriage is valid since there is no legal bar to a marriage between a man and his half-sister.[27] But under the Yoruba customary law, the marriage is void on ground of consanguinity. Two years after their marriage, H. was killed in a motor accident in Ibadan as a result of the negligent driving of X. W. sued in the Western Nigeria High Court on behalf of herself and the child of the marriage under the State's Torts Law for compensation for the wrongful death of H. As regards her own claim, it was necessary to determine the validity of her marriage to H.

We may assume that it was conclusively proved that the parties had in contemplation the Ekoi customary law as the law governing

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27. See T. A. Talbot, In the Shadow of the Bush; A description of the Ekoi of Southern Nigeria, London, Heinemann, 1912, p.110.

the validity of the marriage.[28] Since one of the parties is not a native of Western Nigeria, the woman being an Ekoi, and the marriage transaction was made outside the court's jurisdiction, section 20 (3)(a) of the Western Nigeria Customary Courts Law makes it imperative for the High Court to determine the validity of the marriage by the law binding between the parties. But in determining the law binding between them, the court is required to adopt a subjective test. Therefore, since the parties agreed to regulate their marriage transaction by the Ekoi customary law, that law is the customary law binding between them. The marriage should therefore be held valid even though it was contracted in contravention of the Western Nigerian law concerning prohibited degree of consanguinity. This is irrespective of the fact that the Western Nigerian law is the personal law of the husband at the time of the marriage and the law of the community in which the parties established their matrimonial home immediately after the marriage.

It is submitted that such absurd result which makes nonsense of the legal requirements of customary marriage could not have been in the contemplation of the legislature when the law was enacted. Yet, as regards this provision, Park remarked that it "is exhaustive and complete in itself" and is adequate "for all cases"[29]! With this view, we are bound to disagree. Since it is the desirable intention of the legislature to lay down choice of law rules for the guidance especially of customary courts whose judges are generally not expert lawyers, it is

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28. Of course, it is quite possible that they contemplated nothing explicitly at marriage.

29. Park, Sources of Nigerian Law, pp. 127-128.

suggested that a better means of doing this would be to provide new choice of law rules that will govern each class of case in intranational conflicts in substitution for the present omnibus rule applicable to all cases.

The Eastern Nigerian States' Provision

The provision of the Eastern Nigeria Customary Courts (No.2) Edict[30] is substantially the same as the Western Nigerian provision. Without going into specific details as to the circumstances under which the provision should apply as in the case of the Western and Mid-Western rule, it too provides that

> "the customary law prevailing in the area of the jurisdiction of the court or binding between the parties"

should be applied where a transaction before the court has connection with more than one system of customary law.

A great flaw in the above statutory choice of law rule, if it is to be applied to determine the validity of a customary marriage, is that it is too general and vague. So vague that the propagation of the test of "law binding between the parties" would appear not to be more than the substitution of judicial discretion for legal rules. It may be here recalled that it was Savigny who first stated that the function of the conflict of laws was

> "to ascertain for every legal relation that law to which, in its proper nature, it belongs or is subject." 31

But instead of defining specific points of contact which will be used to determine the law governing the validity of marriage as other systems of conflict of laws, the provision offer a

30. No.29 of 1966, s.15(a).
31. Savigny, op.cit., s.348.

general test of the law binding between the parties. So until the courts eventually establish a new rule for determining the phrase "the law binding between the parties", the applicable law governing the validity of a customary marriage would not be predictable. We may consider for instance the case of

> H. a Bini, subject to the Edo Customary law, who married W., a Calabar girl, who is subject to Calabar customary law. The Marriage was celebrated in Benin-City according to Edo Customary law. At the time of the marriage, H. was 20 and W. was 15. By the Age of Marriage Law applying in the South Eastern State, the marriage is void, it having been contracted "by persons either of whom is below the age of 16" But according to Edo customary law the marriage is valid. The parties are now residing in the South Eastern State where the validity of the marriage arises for determination in a nullity suit taken on appeal to the High Court of that state.

In the above hypothetical case, the law applicable is also the customary law binding between the parties. But unlike the Western Nigerian provision, what test should be applied to determine the law binding the parties is not provided by the Eastern Nigeria Customary Courts Edict applying in the state. Shall the test be the objective one of abstract reasonableness? Or is it the subjective one of discovering the customary law of which place the parties, in fact, submitted the validity of their marriage; in this case the Edo customary law which we may assume was conclusively proved to have been agreed by the parties? However, it is inconceivable that the Southern Eastern

state court will hold as valid a marriage contracted, in contravention of its Age of Marriage Law, by a woman who was not only subject to the law of that state at the time of her marriage but who also continued to live there after the marriage. The fact that the marriage was celebrated outside the state would most certainly be considered insignificant. What is more likely is that the High Court will seize on the ambiguity of the phrase "the law binding between the parties" to lay down new choice of law rules that should govern the essential validity of customary marriage having connection with more than one system of customary law. In which case, such a solution would have given strength to our contention that the provision of the Customary Courts Edict is not more than an illusory and insufficient guide.

The Northern Nigerian States

It now remains to consider the provisions of the six Northern Nigerian states. First, it must be pointed out that since the creation of the six states out of the former Northern Region of Nigeria in May 1967, each of the states has re-enacted, with slight modifications, the Native Courts Law, 1963[32] as its own Area Courts Edict.[33] A striking feature of the new Edicts is their identity as to sections and substance on choice of customary law rules and other matters. Consequently, it will not

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32. Cap. 78, Laws of Northern Nigeria, 1963 ed.

33. See, The Area Courts Edict, No.1 of 1967 of the North-Western State
" " " " , No.2 of 1967 of the North-Central State
" " " " , No.1 of 1968 of the North-Eastern State
" " " " , No.2 of 1967 of the Kwara State
" " " " , No.2 of 1967 of the Kano State
" " " " , No.4 of 1968 of the Benue-Plateau State.

be necessary to refer to more than one of the Edicts in discussing their provisions on this topic.

Two sections of the North-Western State, Area Courts Edict, 1967 are relevant to the choice of the applicable law.

Section 20 (1) of the Edict provides that, subject to the provisions of section 21, an Area Court, i.e. a customary court, shall, in "civil causes and matters", administer

(a) the customary law prevailing in the area of jurisdiction of the court; or

(b) the customary law binding between the parties.

At section 21 (1) of the Edict, it is provided that in "mixed civil causes, other than land causes", the governing law should be ascertained as follows:

> "(a) the particular customary law[34] which the parties agreed or intended, or may be presumed to have agreed or intended, should regulate their obligations in connection with the transaction which are in controversy before the court; or
>
> (b) that combination of any two or more customary laws which the parties agreed or intended, or may presumed to have agreed or intended, should regulate their obligations as aforesaid; or
>
> (c) in the absence of any agreement or intention or presumption thereof -
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> (i) the particular customary law; or
>
> (ii) such combination of any two or more customary laws, which it appears to the court, ought, having regard to the nature of the transaction and to all the circumstances of the case, to regulate the obligations of the parties as aforesaid,
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> but if, in the opinion of the court, none of the paragraphs of this sub-section is applicable to any particular matter in controversy, the court shall be governed by the principles of natural justice, equity and good sonscience."

The following remarks must be made about the above provisions in considering their import. Section 20 deals with what

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34. The words "native law and custom" are used in the text to describe customary law.

may be termed all "unmixed civil causes" while section 21 deals with what the Edict calls all "mixed civil causes" other than land causes. "Cause" and "matter" have the same definition as in the Western Nigerian provision. In effect "civil causes and matters" as used in section 20, or "civil causes" as employed in section 21, mean no more than actions, suits or other original proceedings between parties to a civil case, as opposed to a criminal case.[35]

A "mixed cause" is defined as an action, suit or proceeding in which two or more parties are normally subject to different systems of customary law. Therefore, an "unmixed civil cause" is defined by implication as an action, suit or other proceeding in a civil case between parties who are subject to the same system of customary law.

In the light of these definitions, the effect of section 20 (1) is that the governing law in a suit, action or proceeding, where the parties are subject to the same system of customary law, is either the customary law prevailing in the area of jurisdiction of the customary court, or binding between the parties. As the case of Osuagwu v. Soldier[36] has shown, the test for determining whether the parties are subject to the same system of customary law, and if so which, is that of "ethnic identity" of the person concerned. Thus according to the principle

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35. Area Courts Edict, North-Western State s.2.

36. (1959) N.N.L.R.39. The relevant part of the judgment of Brown C.J. in which he was concerned with the interpretation of an identical version of the above provision, which was contained in the Northern Region, Native Courts Law, 1956, s.20 (1), is as follows: "We suggest that where the law of the court is the law prevailing in the area but a different law binds the parties, as where two Ibos appear as parties in the Moslem court in an area where Moslem law prevails, the native court will - in the interests of justice - be reluctant to administer the law prevailing in the area, and if it tries the case at all it will - in the interests of justice - choose to administer the law which is binding between the parties".

established in that case, if two members of an ethnic group dispute, in an action, the essential validity of their customary marriage on the ground of consanguinity or non-age, the governing law will be the customary law of the ethnic community of which they are members. If they are members of a community indigenous to the area of jurisdiction of the court, then the predominant system of customary law in existence in such area[37] applies to the action as "the law prevailing in the area of jurisdiction of the court". But if the ethnic community of the parties is outside the area of jurisdiction of the court, then the law of such "foreign" community applies as the law "binding between the parties".

In short, the choice of law rule contained in the identical provisions of section 20 (1) of the Area Courts Edicts is to the effect that in any action, suit or other proceeding, where the parties are members of the same ethnic community, a customary court seised of the action in a Northern Nigerian state must apply the customary law of the ethnic community of which they are members. The provision as regards the application of "personal law" may be criticised, first, on the ground that it is an omnibus one which is applicable to all "civil causes and matters", and secondly, because it does not apply, like the provisions of the other groups of states, to an issue which arises as an incidental matter in a cuase, as distinguished from such cause of action. But despite these short-comings, the section as interpreted by the High Court, is useful in determining the essential validity of a polygamous marriage whenever it arises as a cause of action, e.g. nullity suit. In this respect, the

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37. R. v. Ilorin Native Court, ex p. Aremu (1953) 20 N.L.R. 144.

section accords with the orthodox rule of private international law that the personal law of the parties determines whether or not their marriage is intrinsically valid.

It has also been stated by the High Court that the provisions of sections 20 (1) and 21 (1) on choice of law should be operated together.[38] Also, since it has been decided by the High Court, on appeal, that ethnic criterion should be used to determine the system of customary law applicable, the effect of section 21 (1), which deals with the situation where the parties are subject to different systems of customary law, becomes clear. Thus, in a conflict of laws situation as when members of two distinct ethnic communities inter-married and the essential validity of their marriage falls for determination, a customary court in each of the six Northern Nigerian states has the choice of any of the following systems of law to determine the matter:

(a) the particular system of customary law agreed by the parties; or

(b) the particular system of customary law implied by, or imputed to, their conduct in the transaction which is the subject of the controversy before the court; or

(c) a cumulation of two or more systems of customary law agreed by the parties; or

(d) a cumulation of two or more systems of customary law, implied by, or imputed to, their conduct in the transaction which is the subject of the dispute before the court; or

(e) the particular system of customary law which the court thinks is just, having regard to the nature of the transaction in dispute, and to all the circumstances of the case; or

38. Osuagwu v. Soldier 1959 N.N.L.R. 39.

(f) the cumulation of any two or more systems of customary law which the court thinks are just, having regard to the nature of the transaction in dispute, and to all the circumstances of the case; or

(g) if the matter is still unresolved after the court has considered the above rules, then the court "shall be governed by the principle of natural justice, equity and good conscience".

Two general comments that may be made about the above rules are as follows: The first is, that even though section 21 (1) is designed to deal with the situations where the parties are subject to different systems of customary law, yet, it refrains from laying down the tests which the courts should apply in making a cumulative application of two or more laws to a given situation. Secondly, it seems to have been envisaged that in a conflict of laws situation, more than one system of laws may have to be applied; and there may be circumstances where the applicable law may be applied, either objectively or subjectively.

From these observations, the clear object of the section is not to lay down one specific rule of inter-local conflicts that should be applied to a variety of causes, like marriage, divorce, contract, tort, etc., as in the case of the provisions of the other states. Rather, the object of the Edicts seems to be the laying down of some comprehensive directives, leaving it to the courts to work out, from case to case, and in conformity with their idea of justice, the situations where a particular customary law or a combination of two or more systems should be applied, either objectively or subjectively.[39] These general

39. For instance, the legislature of the former Northern Region of Nigeria had itself provided a choice of law rule that should be applied in the field of succession; See s.30, Northern Nigeria, Land Tenure Law, Cap.59 (1963 ed.).

directives would seem to be more advantageous in the circumstance than the unsatisfactory position in the Western, the Mid-Western and the Eastern states, where a single choice of law rule is provided for all diverse situations. Unfortunately, there has been no reported case as to how the courts will apply these general directives to determine the essential validity of a polygamous marriage. But one thing is clearer now than before. Now that a customary court in the Northern Nigerian states has power to apply principles of English common law,[40] the most likely result of this new power will be that if there is already in existence a decision of the High Court on inter-state conflicts, such decision would be used, by analogy, by the customary courts to determine a similar point of inter-local or inter-communal conflicts.

We have endeavoured to show that the Western and the Eastern Nigerian Laws are either inapt or too vague to be of any assistance in determining the law that should govern the essential validity of a polygamous marriage. Indeed, it is our contention that such an omnibus provision, indicating a single choice of law rule for a wide variety of situations cannot achieve any perfection on all the matters covered. We have also attempted to show that apart from section 20 (1) of the Area Courts Edicts of the Northern Nigerian states, the provisions of the Edicts as regards mixed situations, are not more than general directives for the guidance of the courts without

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40. See s.20 (3) of the North-Western, Area Courts Edict, No.1 of 1967. This provision has the effect of nullifying the statement made in the Ghana case of Ghamson v. Wobill (1947) 12 W.A.C.A.181, which has the support of Park, op.cit., pp.116-117, that these statutory rules, and not rules of private international law, should be applied by the High Courts when they are confronted with problems of inter-local conflicts.

laying down any specific rule for any particular situation. Consequently, the rest of this part will be concerned with some suggestions as to which law should be applied by both the High Courts, the Customary Courts and all other courts in Nigeria, to govern the essential validity of a polygamous marriage. In this particular respect, we see no justification for making any distinction between intra-national and international conflicts in view of our earlier submission that, in the field of marriage, intra-national or inter-state choice of law rules should normally set the pattern for private international law in its wider sense.

4. CASE FOR REFORM

Much emphasis is often placed on the fact that a polygamous marriage in Nigeria, and indeed in Africa as a whole, is in effect a contract, that is, that it is a multi-partite transaction in which the consensus is not between the man and the woman but an agreement between the respective families of the man and the woman; that, no doubt, this contractual aspect of a polygamous marriage is further illustrated by the requirement that the payment of money or money's worth should be made by the man or his family to the woman's family before a valid marriage can be constituted. In view of this peculiar nature of polygamous marriage, it has been suggested that the rule of validation of a polygamous marriage cannot but be a dissenter from the conflicts orthodoxy of the European law.[41] Influenced

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41. G.R.J. Hackwill, "Southern Rhodesia Native Law; Conflict of Laws in Relation to the Guardianship of Children after Divorce" in R.N.L.J. Vol.I (1961) 71 at p.72.

by this "contract theory", it has been stated by Hackwill, for example, that the validity of a polygamous marriage should be determined according to that system of law under which the parties purported to marry. According to him, the applicable law will, in most cases, be the personal law of the bride which, it is claimed, often dictates the ceremony of marriage especially in those systems of law where the payment of bride-price constitutes an essential requirement of the marriage.[42]

It is submitted that this argument about the purely contractual nature of a polygamous marriage is fallacious. According to Osborne C.J. in Savage v. Macfoy,[43] "Marriage" whether monogamous or polygamous "is something more than a mere contract, and creates a definite status." This principle cannot be disturbed merely because a polygamous marriage does not usually require the approval of some state official as in monogamous marriage. What is necessary is that such status must have come into effect by the operation of law. The way in which the law brings it about is immaterial. Otherwise there would be no legal justification for the conferment of the status of husband and wife on parties to a common law marriage celebrated without the intervention of an ordained priest or a registrar of marriage.

Furthermore, as pointed out in discussing the statutory choice of law rules, it will be wrong in principle to determine the essential validity of a marriage at the behest of whatever law, out of many, parties to such marriage may decide to submit.

In fact, there would seem to be no logical reason why the private international rule suggested for determining the essential validity of a monogamous marriage should not be capable of

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42. Ibid.

43. (1909) 1 Ren. G.C. Rep. 504 at p.508.

being employed to determine the validity of a polygamous marriage, both at the intranational and inter-national levels. For polygamous marriages, the rule of validation may be stated as follows:

> A polygamous marriage is valid as to essentials if it complies with the personal law of each party at the time of marriage; provided that a marriage should not be declared void if it is valid according to the law of the place in which the parties intended at the time of marriage to establish their matrimonial home and such intention has in fact been carried out.

The application of the personal laws of the parties for the regulation of their polygamous marriage is not a new approach in Nigerian private international law, as instanced by the decision of the old Supreme Court of Lagos in Savage v. Macfoy.[44] The statement of Osborne C.J. in that case only stands discredited on the ground that the learned Chief Justice considered the lex domicilii originis as the most appropriate law for determining the capacity of a person to enter into such marriage.

Savage v. Macfoy was concerned with a succession suit in which the validity of a polygamous marriage alleged to have existed between Claudius Macfoy and Susannah Savage was raised. Claudius Macfoy was born in Sierra Leone where some of his ancestors had settled after they had been rescued from slavery. His domicile of origin was Sierra Leone. Subsequently he came to Lagos where he had his primary education. After several visits to other parts of Africa, he finally settled in Lagos where he acquired a domicile of choice. Later on, he went through a form of polygamous marriage according to the Lagos

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44. (1909) 1 Ren. G.C. Rep. 504.

customary law with a christian girl, Susannah Savage, also domiciled in Lagos. This marriage was at all times potentially polygamous, i.e. Macfoy never took another wife during his lifetime. There were two children of the marriage before the death of Macfoy on June 25, 1906. The action was brought by the plaintiff, Susannah Savage, on behalf of herself and the children of the marriage, claiming that they were entitled to the real and personal property of the deceased as against the defendants who were brothers of the deceased. The court felt bound to determine the validity of the marriage between Macfoy and Savage so as to enable it to arrive at a conclusion as to whether or not Susannah Savage was in fact the lawful widow of the deceased and whether the two children of the marriage were legitimate.

Osborne C.J., found as a fact that all the essentials of a customary marriage were present in the union between the parties but nonetheless held the marriage invalid. Two reasons were given for the invalidity of the marriage. One was achieved by the employment of the doctrine of public policy. Resorting to the legal theory that the point of paramount importance in any given case is to discover whether there is any statute applicable to the case, the judge found a useful discovery for the purpose on hand in the Lagos Supreme Court Ordinance, section 19 of which, in effect, provided as follows: Customary law is applicable to "any person", especially in a transaction or dispute involving a native of Nigeria and a non-native when the non-application of customary law will result in substantial injustice to either party.[45] The court, having held that "any person" as

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45. An almost identical provision is contained in the High Court Laws of the States.

used in the section excluded a person who is not a native of Nigeria, clearly recognised that to deny a woman who was regarded by customary law, and the community in which she lived as a wife, the right to share in the intestate property of her husband amounted to substantial injustice but got round the application of the section by saying that it did not apply to "a contract of polygamous marriage when expressly repugnant to the English law ... on grounds of public policy" and cited the English case of Hyde v. Hyde[46] in support.

The second reason is better stated in the words of the learned Chief Justice himself. He said,

> "He [Claudius Macfoy] came from Sierra Leone where polygamy is unlawful ... The mere fact of Macfoy having made Lagos his domicile of choice would not necessarily make him subject to or given [sic] the benefit of native law and custom, and his ordinary relations would be governed by English and not native law", [47]

and added that

> "no effect will be given in this court, whatever views native tribunals may take in such matters, to a polygamous union which would not be recognised as valid by the laws of the domicile of[48] origin of either party." [49]

A similar view that a person whose domicile of origin precluded from contracting a polygamous marriage could still not enter into such marriage even after acquiring a domicile of choice in Nigeria was contained in the obiter dictum of Hedges J.,

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46. (1866) L.R. 1 P. & D. 130.

47. (1909) 1 Ren. G.C. Rep. 504 at p.508.

48. The report of the case contains "domicile or origin of either party" but a careful reading of the case clearly shows "domicile of origin ..." is what is meant by the C.J. The words "domicile or origin" must have been one of the several reporter's errors in the case.

49. (1909) 1 Ren. G.C. Rep. 504 at p.508.

in Fonseca v. Passman.[50] There was no reference to Savage's case in the Fonseca's decision but it is beyond doubt that the decision in the former case must have influenced Hedges, J., in expressing this view. That view, therefore, stands or falls with Savage v. Macfoy.

It is submitted that Savage v. Macfoy was wrongly decided on the basis that the two reasons given by Osborne, C.J., for his decision did not represent common law. With respect, we may even say the decision is incompatible with common sense. In fact it is difficult to conceive a more bizzare mis-statement of the English common law rules of private international law as they existed at the time of their reception in Nigeria even assuming that the judge had no alternative but to follow them slavishly. Needless therefore to say that the wall of separation between monogamy and polygamy had, to greater extent, broken down in all common law countries.

The case of Hyde v. Hyde which the learned Chief Justice cited as authority for arriving at his decision that a polygamous marriage contracted in Nigeria - a predominantly polygamous society - between two Nigerian domiciliaries is invalid on grounds of public policy does not support his judgment. Hyde's case was concerned with a husband's petition for divorce on ground of his wife's adultery. The husband was an Englishman by birth. In 1847 when he was about 16 years of age, he joined a congregation of Mormons in London and was soon afterwards ordained a priest of that faith. In London he met and became acquainted with the respondent who, like her parents, was a Mormon. They later became engaged. In 1850, the respondent and her mother went to Salt Lake in the territory of Utah in the

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50. [1958] W.N.L.R. 41.

United States of America and in 1853 the petitioner joined them there. In the same year they were married in Utah, the marriage being celebrated by the president of the Mormons who was also the governor of the territory. They cohabited as man and wife in Utah for about three years. Later on, the petitioner went on a mission to the Sandwich Islands leaving the respondent at Utah. On his arrival at Sandwich Islands he renounced the Mormon faith and openly preached against it. As a result of his activities at this place, a sentence of excommunication was pronounced against him, and his wife declared free to marry which she did shortly afterwards. In 1857, the petitioner returned to England. It is not clear whether the husband was domiciled in Utah during his three years residence in that territory. In fact, no allusion was made to his possible domicile in Utah throughout the judgment of Lord Penzance. Only in the head note to the case was it stated that Mr. Hyde resumed his domicile in England on his return there in 1857.

Lord Penzance refused to adjudicate on the petition on the ground that the marriage was a polygamous one. His main reason for refusing to assume jurisdiction over the marriage was that "the matrimonial law of this country is adapted to the Christian marriage, and it is wholly inapplicable to polygamy".[51] About half of Lord Penzance judgment was devoted to explaining the fanciful estimates of the judicial difficulties involved for an English court to assume jurisdiction on a polygamous marriage. In emphasising the point that the marriage was being refused recognition solely for the purpose of divorce jurisdiction the judge in conclusion of his judgment said:

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51. (1866) 1 L.R. P. & D. 130 at p. 135.

> "This court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of polygamous unions, or upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England." 52

The first point that emerges from the facts and the decision in Hyde v. Hyde is that the principle enunciated in that case relates to the degree of recognition that should be given to a polygamous marriage by English law. The validity of the marriage according to the law of the Territory of Utah was not in question. In several passages in his judgment, Lord Penzance assumed that the marriage was a perfectly valid polygamous one in the country where it was contracted.[53]

Secondly, it is obvious from the statement of Lord Penzance quoted above that his decision was not based on the ground that the recognition of the polygamous marriage would be contrary to English public policy, but on the ground that English matrimonial law is geared to monogamous marriages and is wholly inapplicable to polygamy.[54]

From the above analysis of the case of Hyde v. Hyde, it will be clearly seen that for Osborne C.J., to hold on grounds of public policy as he did in Savage v. Macfoy that a polygamous marriage contracted in Nigeria by two Nigerian domiciliaries is an illicit intercourse and that the female party to it is a feme sole is obviously going much further than to hold that the matrimonial remedies of the English courts are not available to

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52. (1866) 1 L.R. P. & D. 130 at p. 138.

53. See also Re Bethell (1887) 38 Ch.D.220 where Stirling J. held that a marriage between an Englishman and an African woman in a Barolong tribe was a marriage in the Barolong sense only, even though it was refused recognition in England.

54. Cf. Morris, "The Recognition of Polygamous Marriages in English Law", 66 Harv. L.Rev. 961 at p. 967 and Beckett, 48 L.Q.R. 341.

such parties. Also, it will have been observed that the point arising for determination in Savage v. Macfoy, i.e. the right of the female party to succeed to the intestate estate of the husband was expressly left open by Lord Penzance. Since Hyde's case was not based on grounds of public policy of "English law" - by English law, it may be conceded that the Chief Justice meant the received common law operating in Nigeria and not the law in England - it becomes clear that the concept of public policy applied in Savage v. Macfoy was of the court's own creation.

While it is true that in the sphere of domestic as well as foreign law, the courts of a country can withhold their support from transactions inimical to the public welfare or the morality of the society as a whole, the crucial question here is whether the canon of exclusion should be that of an extraneous law received as part of the Nigerian law and which applies relatively to a minority of the population of the country. In other words, should the doctrine of public policy in Nigeria invariably reflect the attitudes of the received law with the result that whenever an institution of the indigenous law is inconsistent with the notion of "English" public policy, it should be struck off? Or should public policy in Nigeria be based on the harmonisation of the precepts of these two systems of law on the ground that public policy varies from country to country[55] depending on the social interest or institutions the country considers best to protect? To give a negative reply to

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55. For a comparison of the concept of Public Policy in English, and other foreign laws, see Graveson, Comparative Aspects of the General Principles of Private International Law, pp.38-47; D. Lloyd, Public Policy.

the last inquiry will not only defeat the purpose of the reception of the English law in Nigeria i.e. to supplement the customary law existing in the country before the advent of the British, but will also amount to starting from the wrong postulate of the superiority of the received law to that of the indigenous population - a view has no logical basis to sustain it. For as pointed out by Kollewijn[56]

> "whether a legal system is good or not can only be considered in connection with a group of persons to be governed by it."

Whether the institution of polygamy is to be confined to certain people within Nigeria is a policy matter to be decided by the legislature. Since the statute contemplated the possibility of foreigners entering into such marriage, it is not competent for the judge to employ the elusive concept of public policy to invalidate a legal relation which is in keeping with the deep-rooted tradition of the community. Public Policy

> "should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idosyncratice inferences of judicial minds." 57

The application of public policy to invalidate the customary marriage becomes difficult to justify when it is observed that besides the exceptional rule which permitted customary law to be applied in a transaction between a Nigerian native and a non-Nigerian where substantial injustice will result to either party by the non-application of such law, Osborne C.J., found as a fact that Macfoy was not only domiciled in Lagos but was sufficiently identified with the native community so as to enable his

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56. Op.cit., pp.314-315.

57. Fender v. St. John Mildmay [1938] A.C.1 at p.12.

children, including those born out of "native-wedlock", to be legitimatised by acknowledgment under customary law. As to the entitlement of such children to succeed to their deceased father's estate, the judge held

> "I am perfectly clear that the ordinary rule applies ... in this case the native law of succession." 58

He accordingly gave the children their entitlement under customary law. If Macfoy was able to claim the benefit of customary law to legitimatise his illegitimate children by acknowledgment, the question must be asked why public policy prevented him from contracting a marriage under the same law. From this, it must be clear that the application of public policy to invalidate the marriage was an undesirable attempt by the Chief Justice to promote through judicial channels the spread of Western civilization.

A second and equally important criticism of the decision in Savage v. Macfoy is that the Chief Justice accorded more reocognition than necessarily permitted by the common law rule of private international law to the domicile of origin in holding that capacity to marry is to be determined by the law of domicile of origin when such domicile had been superseded by one of choice. For despite the tenacity of the domicile of origin and its capacity for revival, it has been long established by the House of Lords in Udny v. Udny[59] that

> "when another domicile is put on, the domicile of origin is for that purpose relinquished, and remains in abeyance during the continuance of the domicile of choice."

Once it had been found by the Chief Justice that Macfoy had

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58. (1909) 1 Ren. C.C. Rep. 504 at p. 508.

59. (1869) L.R. 1 Sc. & Div. 441 at p. 458.

abandoned his Sierra Leone domicile of origin and acquired a new domicile of choice in Lagos before his marriage, there is no principle or authority to support his finding that the law of Sierra Leone, and not the law of Lagos, must determine his capacity to enter into a polygamous marriage.

Despite these shortcomings of the decision in Savage v. Macfoy, it is submitted that some significance should be accorded to the case as authority for the law determining the validity of a polygamous marriage between a foreigner and a native of Nigeria. An obvious advantage of the decision in the case is its recognition that the personal laws of either party must determine the validity of a polygamous marriage between them.

The principle that the personal laws of the parties determine the validity of a polygamous marriage has been accepted in Ghana and Southern Rhodesia. Thus in the Ghanaian case of Davies v. Randall,[60] a man born and domiciled in Sierra Leone married in Ghana a Ghanaian woman domiciled in Ghana. The marriage was celebrated according to Fante Customary law to which the woman was subject. The parties lived together in Ghana, the husband never losing his domicile of origin in Sierra Leone where he visited from time to time. The husband later died intestate in Ghana. The plaintiff, the sole surviving child of the marriage, claimed a share in the deceased father's estate. As a preliminary issue it was necessary to determine whether the plaintiff was the legitimate child of the deceased which in turn depended on the validity of the marriage between his parents.

Charles,J., found no difficulty in identifying the marriage

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60. [1962] 1 G.L.R. 1.

as a polygamous one the validity of which must be determined by the antenuptial lex domicilii of the parties i.e. by the law of Sierra Leone and Fante customary law of Ghana. The judge was unable to sustain the validity of the marriage on the ground that there was insufficient evidence about the law of Sierra Leone as regards the capacity of a person domiciled there to contract a valid polygamous marriage. What is surprising is why the learned judge did not presume that the law of Sierra Leone was, under such circumstances, the same as that of Ghana in accordance with the common law rule of private international law introduced into Ghana in 1874 and which the court may apply on a doubtful point by virtue of the Interpretation Act.[61]

The principle that a polygamous marriage must comply with all the requirements prescribed by the personal laws of the parties before it can be considered valid was also adopted by the Southern Rhodesia Native Appeal Court in Rhodia v. Mandala[62] and Leya and John Phiri v. Masauso Banda,[63] both of which were custody cases in which the validity of the marriage between the parents was raised.

In conclusion, the above survey clearly shows that a polygamous marriage is not differently regarded from a monogamous in some jurisdictions in Africa and that the self-same rule devised for testing the essential validity of a monogamous marriage is equally applicable for the determining the validity of a polygamous marriage. But as a result of the inadequacies of the

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61. (C.A.4) of 1960, s.17.

62. [1942] S.R.N. 179.

63. [1958] S.R.N. 605.

dual-domicile rule noted in considering the law that governing the essentials of a monogamous marriage,

> it is submitted that a polygamous marriage which is not valid according to the personal law should not be declared void if it is valid by the law of the place where the parties intended at the time of marriage to establish their matrimonial home and such intention was in fact carried out. 64

Lastly, one problem that arises for consideration in adopting this approach relates to the payment of bride-price or dowry which is a prerequisite of a polygamous marriage in all the jurisdictions in Nigeria and most systems of law in Africa. For whatever the social purpose or the theoretical justification for this institution, it must be realised that in a conflict of law case it cannot be regarded as more than a monetary transaction which requires the consensus of the parties before it can be effectively resolved. Thus, for example, immense problems of great complexity will arise if the determination of this requirement is delegated to the personal laws of the parties where (a) the personal laws of the parties stipulate different amounts as bride-price or (b) one law provides for its payment and the other does not. A cumulative application of the personal laws of the parties in such situation is impossible. In this respect, four solutions each of which is equally arbitrary may be posited. The applicable law may be

i. the law providing for a higher amount of bride-price, or

ii. the law stipulating for the payment of a lower amount, or

iii. the law of the husband, or

iv. the law of the wife.

In view of the arbitrariness of these solutions, it is submitted

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64. Cf. Art. 11(2) Ethiopian Code of the Conflict of Laws, in Sedler, op.cit., pp.166-167.

that the most appropriate law for regulating this requirement of customary marriage will be the law agreed or presumed to have been agreed by the parties i.e. on the analogy of the proper law of contract.[65] It will therefore be necessary to divorce the requirement of bride-price or dowry from other requirements of polygamous marriage and subject it to a different rule of validation. We have already noticed that the payment of bride-price is a dying institution since the waiver of its payment does not vitiate the marriage. When the institution is finally abrogated, the rule proposed for its validation in conflictual cases will also wither away.

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65. Cf. Shahnaz, v. Rizwan [1965] 1 Q.B. 390.

CHAPTER FOUR

DIVORCE

Introduction

According to the scheme of this work, a discussion about the dissolution of marriage will be limited to that of absolute divorce, not only because the conflict rules concerning divorce are, to a certain extent, equally applicable to other areas of limited divorce such as judicial separation or nullity of voidable marriage, but more important because it is in respect of absolute divorce that problems of a conflictual nature are mostly being experienced at present in Nigeria.

The conflict of laws problems relating to divorce will be examined from three angles. First, we shall consider the basis of the courts' jurisdiction in divorce, i.e. the connection which parties to a divorce suit are required by law to have with a legal district in Nigeria, or possibly with the country as a whole, before the court of such place could grant a divorce decree to the parties; secondly, we shall discuss the problem of choice of law, i.e. what system of law is applicable to such suit; and thirdly, the recognition of foreign divorce decrees, i.e. under what conditions are divorce decrees of foreign courts to be recognised as decisive in terminating the status of marriage existing between the parties. But before each of the above aspects of divorce is considered in respect of monogamous and polygamous marriages, it will be necessary to elaborate on the question raised in chapter one concerning the "choice of courts".

A. CHOICE OF COURTS

The problem discussed under this head differs from the normal practice in private international law where choice of courts implies choice of the judicial system of a particular country which is competent to order the dissolution of marriage having a foreign complexion. The term "choice of courts" is rather used to indicate which particular system of court in Nigeria, out of the two hierarchy of courts - the customary and the "English" type courts operating in each of the Nigerian states, possesses adjudicatory powers to grant a divorce with extra-territorial effect.

The question of choice of courts does not arise in respect of a divorce suit involving parties to a monogamous marriage whatever their nationalities. Only the High Court of a state has adjudicatory powers to dissolve such marriage. The problem here envisaged relates exclusively to the dissolution of polygamous marriage contracted by non-Nigerians, since if the parties are Nigerians, the appropriate court to dissolve their polygamous marriage is the customary or native court. A discussion on this point may be commenced by considering the following hypothetical case:

> Suppose one of the Sudanese parties to a polygamous marriage contracted in the Sudan or even in Nigeria wants to institute divorce proceedings in Nigeria. To which court, the customary or the High Court should he or she resort for legal redress?

It will be well to remember that all matters relating to polygamous marriage, including its conflictual aspects, are within the competence of each state in Nigeria. Consequently, it

will be hardly surprising to observe that lack of complete uniformity exists between the solutions provided by each of the states as regards this problem.

In the Lagos, the Mid-Western and the Western states, the jurisdiction of the customary courts over persons does not embrace individuals who are non-Nigerians. The relevant provision imposing this restriction is section 17 of the Customary Courts Law of Western Nigeria which, as a result of the two recent delimitations of boundaries of the former Western Region of Nigeria, becomes applicable to the customary courts in the Lagos and the Mid-Western states.[1] The section provides in terse terms that "A customary court shall have jurisdiction over all Nigerians." The clear effect of this provision, therefore, is that when the parties are not Nigerians or when only one of them is a non-Nigerian, a customary court in any of these states must not assume jurisdiction to dissolve a polygamous marriage between them.

A similar provision limiting the jurisdiction of customary courts to Nigerians exists in the Eastern Nigerian Customary Courts (No.2) Edict of 1966[2] which now applies in all the states carved out of the former Eastern Region of Nigeria. But following the lead given by section 18 of the Northern Nigerian Native Courts Law,[3] this Edict gives in addition the Eastern Nigerian customary courts, like their counterparts in the Northern Nigerian states, jurisdiction over non-Nigerians who consent to the exercise of such jurisdiction either expressly or impliedly (by

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1. Supra, chapter 1, note 21, p. 57.

2. No.29 of 1966, s.11 which replaces s.23 of the Eastern Nigerian Customary Courts Law, Cap.32 of 1963.

3. See now ss.14 and 15 of the Area Court Edict of each of the six Northern Nigerian States.

a previous institution of any proceeding in such a court). The effect of these provisions, therefore, is that a non-Nigerian who so desires may commence his or her divorce suit in any customary or native court in the Eastern and the Northern Nigerian states.

But even as regards these states, the consent provisions would seem not to be more than a mere palliative which will seldom appeal to most foreigners. For some of the general characteristics of the customary courts in these states are that legal representation is not allowed before them,[4] the law they apply is predominantly customary law,[5] and the language by which court proceedings are conducted is the local one[6] which is generally not understood by foreigners besides the fact that these languages differ from court to court depending on which particular tribe the court is situated. In view of these handicaps on the part of non-Nigerians and the courts themselves, it is conceivable that the opportunity provided by these "consent provisions" will seldom, if ever, be taken by foreigners. Indeed we think that such less formal tribunals would be quite unsuited for trial of issues of private international law for which high judicial qualities are essential, especially at the outset when

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4. Except in all the "Grade A" and few "Grade B" customary courts in the Western state which are manned by qualified common law lawyers.

5. The term "customary law" is here and henceforth in this chapter used as including moslem law which is applied as customary law in all the Nigerian states. See the Nigerian Republican Constitution, 1963, item 23, the Exclusive Legislative List which speaks of "moslem law or other customary law", and s.2 of the Northern Nigeria Native Courts Law, 1963 which provides that "Native law and custom includes moslem law".

6. Hence the necessity for whole statutes e.g. the Criminal Procedure Code 1960, of Northern Nigeria to be translated into Hausa language before its provisions could be understood by most customary court judges.

we are breaking new grounds and asking the judicial system to create a whole jurisprudence which will govern important matters for many years to come. For in this field, issues of fact and of law are often more complicated and more difficult than many actions of a purely domestic nature. This leads to a consideration as to whether the High Court is competent to assume jurisdiction in respect of such polygamous marriages.

To start with, all the state High Courts, except the Lagos High Court where, originally, there were no customary courts, have an appellate jurisdiction on appeals as a matter of right, either directly or through a subordinate court, from the customary or native courts on any matter of customary law. Consequently, all the High Courts are impelled by express statutory provisions[7] to apply customary law including customary matrimonial law. They, however, have no original jurisdiction on any matter which is subject to the jurisdiction of customary courts relating to marriage, family status, guardianship and succession.[8] (No such limitation is placed on the Lagos High Court, obviously because there were no customary courts in the state. It would seem that the Lagos High Court has original jurisdiction over a polygamous marriage whether between Nigerian or Non-Nigerian parties).[9]

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7. Eastern Nigeria High Court Law, s.20; Northern Nigeria High Court Law, s.34; Western Nigeria High Court Law, s.12; High Court of Lagos Act, s.27.

8. Eastern Nigeria High Court Law, s.14; Northern Nigeria High Court Law, s.17(1); Western Nigeria High Court Law, s.9(1); See also Omorodion v. Fashoro [1960], W.N.L.R. 27.

9. The position as regards all the states' Magistrates' Courts, including their counterparts in the Northern Nigerian states, the District Courts, is clear. They are given specific powers over certain matters none of which includes matrimonial causes relating to either monogamous or polygamous marriage. (See ss.14-15 of the Lagos Magistrates' Courts Act, 1958; ss.19-23 of the Western Nigeria, ss.17-26 of the Eastern Nigeria Magistrates' Courts Laws of 1959 and 1963 respectively, and ss.13-16 of the Northern Nigeria District

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In view of the fact that the jurisdiction of customary courts in some states, viz. the Lagos, the Mid-Western and Western states, does not extend over non-Nigerians, and since jurisdiction over non-Nigerians can be assumed by customary or native courts in the other states only with the express or implied consent of the parties, and in so far as all the states' High Courts are only prevented from assuming original jurisdiction in matters which are subject to the jurisdiction of customary courts, the inescapable conclusion that could be drawn from these states' enactments is that the High Court of each state is given original jurisdiction to dissolve polygamous marriages contracted by non-Nigerian parties presumably because of complicated issues of fact and of law that might arise in such suits. This is however made subject to the discretionary right of the parties in the Eastern and the Northern Nigerian states to institute divorce proceedings in the customary or native courts. Some support for this interpretation is afforded by the West African Court of Appeal's decision in Toriola v. Arewa.[10] In that case, a similar provision contained in the repealed Magistrates' Court Ordinance[11] which stipulated that the Magistrates' Court should not exercise original jurisdiction on any matter which was subject to the jurisdiction of the old native courts relating to marriage, family status, guardianship

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9. (continued) Courts Law, 1963.) Although it is provided by each of the above enactments that the Governor of each state, on the recommendation of the Chief Justice, may authorise a Magistrate or District Court to exercise additional jurisdiction on matters specified or later to be specified, this as far as can be gathered, has not been done in any of the states.

10. (1949) 12 W.A.C.A. 505.

11. Cap. 122, Laws of Nigeria (1948 ed.), s.19 (d).

and inheritance, was construed as giving the Magistrates' Courts jurisdiction on other matters which fell outside the jurisdiction of the native courts. According to Verity, C.J.,

> "it is patent that in regard to this class of case the Magistrate is given jurisdiction by the substantive enactment"

and his jurisdiction is only excluded "where any such case is within the jurisdiction of a Native Court".[12]

A difficulty about this contention, however, emanates from the language of the respective state's enactments concerning the jurisdiction of the High Court. Unlike the repealed Ordinance which gave specific adjudicatory powers to the Magistrates' Courts on certain matters, all the High Court Laws further provide in identical terms that the jurisdiction of the High Court of a state shall be the same and be exercisable as those "vested in or capable of being exercised by Her Majesty's High Court of Justice in England",[13] of course, subject to any local enactment to the contrary. Since the various High Court Laws do not in express terms give original jurisdiction to the courts to adjudicate on polygamous marriage involving non-Nigerians, i.e. since the enabling effect of these enactments is only negative and not positive, could it be argued that in so far as the Nigerian High Courts are enjoined to exercise their jurisdiction in conformity with that of the High Court in England and since the latter court has no jurisdiction to dissolve or grant matrimonial remedies to parties to a polygamous marriage, even if such marriage is only potentially polygamous,[14] the Nigerian High

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12. (1949) 12 W.A.C.A. 505 at p. 507.

13. For the Eastern Nigerian States, see the Eastern Nigeria High Court Law, s.11(1); the Lagos State, High Court of Lagos Act, s.10; the Northern Nigerian States, High Court Law, s.13(1); the Western and the Mid-Western States, Western Nigeria High Court Law, s.8.

14. Hyde v. Hyde (1866), L.R. 1 P. & D. 130.

Courts should also decline jurisdiction in respect of such marriage? It is submitted that such argument is so absurd as not to merit any serious thought for the following reasons.

In the first place, unlike the position in England, polygamy is permitted by law in Nigeria. It is therefore not a foreign institution to which the Nigerian courts are not accustomed and to which limited recognition should be accorded. Secondly, all the Nigerian High Courts, unlike their counterparts in England, are empowered to apply customary law. It therefore cannot logically be maintained on the ratio decidendi of Hyde v. Hyde that the matrimonial law the Nigerian courts are bound to apply "is adapted to the Christian marriage and that it is wholly inapplicable to polygamy". Thirdly, even in Christian countries where polygamy is not permitted, the rule established in Hyde's case has now been recognised as producing hardship and injustice. It is largely for this reason that section 3 of the Australian Matrimonial Causes Act, 1965 adds a new section 6A to a previous 1959 /Act of the same name providing that the Australian High Courts should, as from February 1966, assume jurisdiction and grant all matrimonial remedies to parties to potentially as well as actually polygamous marriages; provided that in the case of an actually polygamous marriage, such remedies should only be made available to the husband and the first of his plural wives. Such liberalising attitude has also been noted in respect of the courts of other countries where polygamy is not allowed. Recently, the Law Commission in England published a Working Paper on Polygamous Marriages in which the rule in Hyde v. Hyde was severely criticised. The view of that Commission which is still provisional, if adopted, will have the effect of abrogating the rule in Hyde's case and

give the English High Courts jurisdiction on potentially and actually polygamous marriages.[15] For in the words of the Commission,

> "our proposals will be designed to adjust our law so as to take account of the social problems presented by marriages at present unrecognised for many purposes because they are actually or potentially polygamous." 16

At this age when rules of private international law in countries where polygamy is not permitted are being modified with a view to mitigating the harshness of previous conflict methodology which left parties to a polygamous marriage bereft of matrimonial rights and remedies in the courts of such countries, it will certainly be unreasonable for the High Courts in Nigeria where polygamy is lawful to invoke this archaic rule to deprive foreigners of the self-same rights and remedies which are being purveyed to Nigerian citizens by the customary courts. The High Courts in Nigeria can bend their administration of justice to various matrimonial laws as a result of the existence of such laws in Nigeria. They can apply Moslem law to Moslems and customary law to people living under the sanction of such law. English courts at present have not much of such flexibility.

It is accordingly concluded that the adjudicatory powers of the Nigerian High Courts on polygamous marriages contracted by foreigners are not ousted because their jurisdiction is made exercisable in substantial conformity with that of the English High Court. As regards the Lagos, the Western and the Mid-

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15. See Para. 53 of the Working Paper No. 21 of 26/7/68 of the Law Commission entitled "Polygamous Marriage". It is interesting to note that this Paper was prepared for the English Law Commission by Dr. J. H. C. Morris, the general editor of Dicey and Morris, Conflict of Laws.

16. Third Annual Report of the Law Commission, 1967/68 (No.15), Para.55.

Western states where the customary courts have no jurisdiction at all over foreigners, it will be nothing but a denial of justice for the High Courts to refuse to adjudicate on polygamous marriages contracted by non-Nigerians. Similarly, in view of the above-mentioned difficulties on the part of foreigners who might otherwise wish to institute divorce proceedings in the customary courts, it would be clearly inequitable for the High Courts of the other states to regard the consent provisions as giving exclusive jurisdiction to the customary courts.

It remains to add that all the above theoretical arguments which the High Courts are bound to face in future would have been avoided had each state High Court Law contained a simple provision giving the courts unlimited original jurisdiction in all matters, except those subject to the jurisdiction of the subordinate courts, without qualifying such provision with a rider compelling them to exercise their jurisdiction in all matters in conformity with that of the High Court in England. To base the adjudicatory powers of the High Courts of a country like Nigeria, whose legal system admits of a different institution like polygamy, on that of another country (England) where such institution is treated differently, is bound to lead to many combinations and permutations of difficulty in most branches of the law, not least, in the field of Nigerian private international law. Most former British Colonial territories in Africa whose Acts contained, of necessity, similar provisions had modified such provisions to take account of their different legal institutions.[17]

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17. See e.g. The Ghana Courts Act (C.A. 9) of 1960, s.29.

B. BASES OF JURISDICTION OF THE NIGERIAN COURTS

(1) DIVORCE JURISDICTION IN ENGLAND

It will help in approaching the bases of divorce jurisdiction in Nigeria if we bear in mind that

> "the jurisdiction of the High Court of a state in relation to ..... matrimonial causes, shall ... be exercised by the court in conformity with the law and practice for the time being in force in England." 18

This identical provision of the State Courts (Federal Jurisdiction Act[19] and the High Court of Lagos Act[20] (both Federal enactments) relates to the dissolution of monogamous marriages, a subject which, as has been explained above,[21] is within the exclusive competence of the Federal Government. Since the adjudicatory power of the High Court is not confined to the dissolution of monogamous marriages but extends to the dissolution of polygamous marriages in certain respects, there would seem to be no reason why the same jurisdictional rules governing the dissolution of monogamous marriages should not be applied to polygamous marriages as well provided the rules are adequate for both purposes. But first, to know the private international rules applicable to the dissolution of monogamous marriages in Nigeria, it will be necessary to consider the position in England.

In England, before the passing of the Matrimonial Causes Act, 1857 which effected a fundamental change in the law by transferring jurisdiction in matrimonial causes from the ecclesiastical courts to the secular courts, the doctrine of the

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18. See the Postscript for the present position of the law on this point in Nigeria.

19. s.4.

20. s.16.

21. Chapter 2.

cannonical courts was that of indissolubility of marriage. An ecclesiastical court had always been competent to grant a decree of divorce a mensa et thoro which separated the parties from "bed and board". But this did not give any of them the right to remarry. The only means by which a party to a valid marriage could avoid the vows of matrimony was for him or her to promote in the House of Lords, after he or she had obtained a divorce a mensa et thoro from an ecclesiastical court, a Private Bill for divorce a vinculo. The net result was that only the Parliament could decree an absolute divorce.

But by 1857, the jurisdiction of the ecclesiastical courts in matrimonial causes was transferred to the secular Court for Divorce and Matrimonial Cuases which, by virtue of the Supreme Court of Judicature Act, 1873 became part of the English High Court. Also by the Act of 1857, the civil courts were given jurisdiction not only to entertain suits for judicial separation and nullity of marriage but also to grant a decree of absolute divorce. For a time after this Act, the English courts vacillated as to what attitude they should adopt on divorce jurisdiction. Thus in Ratcliffe v. Ratcliffe[22] and Tollemache v. Tollemache,[23] the parties' domicile in England at the commencement of the suit was demanded as basis of divorce jurisdiction. Whereas in Brodie v. Brodie[24] the test of bona fide residence in England was held sufficient. In Niboyet v. Niboyet,[25] the question was still in doubt. In that case, the husband who resided in England for several years as a French Consul retained

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22. (1859) 29 L.J.P. & M. 171.

23. (1859) 1 Sw. & Tr. 557.

24. (1861) 2 Sw. & Tr. 259.

25. (1878) 4 P.D. 1.

his domicile of origin in France. The wife, an English woman who before her marriage was domiciled in England, petitioned the court on ground of adultery committed by the husband in England. The husband appeared under protest and alleged that the English court had no jurisdiction to grant the divorce since his domicile was French and only the court of domicile had exclusive jurisdiction to grant divorce decree. This argument was rejected by the Court of Appeal which was of the opinion that the ecclesiastical courts would have granted a divorce a mensa et thoro on the jurisdictional base of residence of the parties in England irrespective of their foreign domicile. This test, it was held by the majority of the Court of Appeal, should be applied as the basis of jurisdiction for absolute divorce. Since the parties were resident in England, the court accordingly ordered the dissolution of the marriage.

In a powerful dissenting judgment, Brett, L.J., disagreed with the majority's view that the local basis of the ecclesiastical court's jurisdiction for divorce a mensa et thoro should be adopted for the general jurisdiction of the High Court in cases of absolute divorce. He pointed out that the 1857 Act which empowered the civil courts to give relief on principles conformable to those applied by the ecclesiastical courts expressly excluded absolute divorce from being governed by such principles. For this, the Lord Justice was of the view that a new principle must be found and this he stated in the following terms:

> "the only court which, on principle, ought to entertain the question of altering the relation in any respect between parties admitted to be married, or the status of either of such parties arising from their being married on account of some act which by law is treated as a matrimonial offence is a country in which they are domiciled at the time of the institution of the suit." 26

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26. (1878) 4 P.D.1 at pp. 13-14.

As could be observed, this reasoning was based on the theory that divorce is the antithesis of marriage and that the law that created the status of marriage should also abrogate the status. But even then, Brett, L.J., would seem to have gone much further than necessarily permitted by the status theory of divorce in his view that only the dissolution of a marriage by the court of domicile will advance the status theory.[27] However, he concluded that the decision of the court below which declined jurisdiction because England was not the country of domicile of the parties should be affirmed.

Brett, L.J.'s, view that domicile is the only source of divorce jurisdiction was unequivocally asserted in 1895 by the Privy Council in Le Mesurier v. Le Mesurier.[28] In that case, the husband, a civil servant in Ceylon, resided for more than nine years in that country. Since he was working in an official capacity in Ceylon, he retained his English domicile. A divorce suit was instituted by him in Ceylon. The case ultimately came on appeal from the Supreme Court of Ceylon to the Privy Council where it was held that the Ceylonese court had no jurisdiction to grant a divorce decree since the husband was still domiciled in England. Lord Watson in delivering their Lordships' opinion, after a review of previous cases, laid down the principle that

> "according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage." 29

Of course this was a decision on the Roman-Dutch law of Ceylon. It has, however, been accepted as establishing the common law on this question.

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27. See below.

28. (1895) A.C. 517.

29. (1895) A.C. 517 at p.540.

But as pointed out by Cook,[30] even in 1895 it was quite clear that there was nothing like a precept of international law which permitted the exercise of divorce jurisdiction only by the court of the country in which the parties were domiciled. This judicial error has recently been put right by the House of Lords in Indyka v. Indyka[31] where it was stated by Lord Reid that

> "from the wording of the judgment [in Le Mesurier's case] it seems to me that in laying down this test their lordships must have thought that they were keeping in line with practice in other civilised countries; but in fact they were not ... So far as I have any knowledge of the matter the position appears to be (and to have been in 1895) that most European countries attach more importance to nationality or sometimes residence"

as basis of divorce jurisdiction.[32] In criticising the Privy Council for having misconstrued the authority of von Bar[33] on this point, similar statements were made by Lords Pearce[34] and Wilberforce[35] in Indyka v. Indyka.

A corollary to the principle of domiciliary jurisdiction was also finally established by the Privy Council thirty years later in A.G. for Alberta v. Cook,[36] an appeal from Alberta, Canada. In the case it was held that in determining the domiciliary jurisdiction for divorce proceedings, domicile of the married pair means, in effect, the domicile of the husband. Although this decision like the one in Le Mesurier's case expounded the law of a foreign country, in the latter case that of

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30. Cook, op.cit., p.460.
31. [1967] 3 W.L.R. 510.
32. [1967] 3 W.L.R. 510 at p. 523.
33. Bar, op.cit., Para. 173 at p. 382.
34. [1967] 3 W.L.R. 510 at p. 537.
35. [1967] 3 W.L.R. 510 at p. 551.
36. [1926] A.C. 444.

Alberta, it too was accepted without question as stating the law of England. Thus by these two decisions the Privy Council, as the apex of Commonwealth judicial system, effectively sowed the seed of discontent which germinated and spread its branches to all the Commonwealth countries. The Courts of these countries found it difficult, as a result of the doctrine of precedent, to uproot it. But almost immediately after each of these decisions, the respective legislatures of these countries embarked on a gradual process of demolition of the principle of domiciliary jurisdiction in divorce.[37]

As a result of the concept of unitary domicile of husband and wife, it was not long before this common law principle produced some hardships especially on the part of the deserted wife. For this hardship the English judges devised a remedy by acknowledging the sufficiency of the pre-marital domicile of the wife for divorce jurisdiction in cases where she had been deserted by her husband, who subsequently acquired a new domicile in another country. Thus in Stathatos v. Stathatos,[38] a woman having an English antenuptial domicile married in London a Greek man domiciled in Greece. After the marriage the parties lived together in London for about three years before they went to Athens. Later a state of friction arose between them and the wife returned to England. Immediately afterwards, the husband obtained a nullity decree in Greece since according to the Greek law, the marriage celebrated in England was void because it was not performed by a Greek Priest. At that time the nullity decree obtained in Greece was of no effect in England.[39] So

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37. See below, note 44 38. [1913] P.46.

39. It seems clear that a nullity decree pronounced by the court of the country where the parties were domiciled even in situations as above will now be recognised by the English courts: See Salvesen v. Administrator of Austrian Property [1927] A.C.641 and De Massa v. De Massa [1939] 2 All E.R.150.

according to English law the wife was still married and even though the marriage had been annulled in Greece, her domicile was still the same as that of the husband. Therefore according to the principle established in Le Mesurier's case only the Greek court, i.e. the court of domicile of the husband, had the sole jurisdiction to dissolve the marriage. In a divorce petition presented by the wife in England, the court was squarely faced with the principle of domiciliary jurisdiction. This difficulty the court surmounted by holding that since the court of the husband's domicile had deprived her of all claims upon her husband, she had a right to resort to the court of the country where she was domiciled before the marriage for a divorce decree which was accordingly granted. In De Montaigu v. De Montaigu,[40] similar reasoning led Sir Samuel Evans to assume jurisdiction on basis of a deserted wife's antenuptial domicile in England to dissolve the marriage between her and her husband who was at the time of the suit domiciled in France. As in the Stathatos' case the marriage in this case has been declared invalid by the French law of domicile of the husband.

The principle established in these cases was short-lived. Having been severely criticised in A.G. for Alberta v. Cook by the Privy Council, it was not followed in subsequent decisions.[41] The result was that the hardship of the deserted wife continued and it was left to the English Parliament to make several infractions of the principle of domiciliary jurisdiction in order to mitigate such hardships.

The first Parliamentary demolition of the foundation which

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40. [1913] P.154.

41. H. v. H. [1928] P. 206; Herd v. Herd [1936] P. 205.

underlay the rule occurred by the enactment of the Indian and Colonial Divorce Jurisdiction Acts 1926-1940. These Acts, which were later extended by Order in Council to other British colonies and territories where there were sizeable numbers of British subjects,[42] provided that the High Court of such country should entertain divorce suits by persons who were British subjects, domiciled in England or Scotland, if the petitioner was resident in such country at the commencement of the suit and such country was where the parties last resided together before the institution of divorce proceedings. To give effect to the status theory of divorce and hence ensure that the decrees granted by the courts of these colonial countries enjoy international recognition, the Acts further provided that the substantive law to be applied should be the lex domicilii of the parties and not the lex fori, though this choice of law was made referrable to the English law alone, since as pointed out by the Royal Commission on Marriage and Divorce, the colonial courts were thought "to have little or no practical experience of Scots law".[43] In other words, the British Parliament agreed with judicial authority that the dissolution of the status of marriage should be the exclusive concern of the personal law of the parties. But to achieve this end, it saw nothing wrong in separating the question of jurisdiction from that of choice of law. The latter continued to be governed by the lex domicilii of the parties whereas the former was for convenience delegated

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42. e.g. Kenya, Uganda, Tangaynika, Hong Kong, Strait Settlements, Jamaica, Ceylon. There seems to be no authority for the view that these Acts were extended to Nigeria, but contra Cheshire, op.cit. (7th ed.) p.342.

43. Cmd. 9678 Para. 866, p.229 (1955).

to the court of the country where the parties were resident. This, in our view, appears the most remarkable breakthrough in international validity of divorce ever made by English law, but which, regrettably, has not been carried through in the domestic law on divorce jurisdiction in England as will be presently shown.

A second legislative incursion into the principle of domiciliary jurisdiction in divorce deals solely with the hardship of the deserted wife and extends the basis of the English Court's jurisdiction in favour of such wife. The first enactment which modified the rigidity of the domicile rule was contained in section 13 of the Matrimonial Causes Act, 1937. This provision was repeated as section 18 (1)(a) of the Matrimonial Causes Act, 1950 and is now re-enacted as section 40 (1)(a) of the Matrimonial Causes Act, 1965. Thus according to this statutory rule, an English court has jurisdiction to entertain a divorce petition presented by a wife whose husband had deserted, or being an alien, such husband had been deported from the United Kingdom even though he had acquired a foreign domicile, provided that the husband was domiciled in England immediately before the desertion or deportation. In doing this, the British Parliament followed with modifications the initiative already taken in some common law countries whose statutes[44] had provided that a wife who was deserted by her husband may bring

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44. For Australia see, New South Wales Matrimonial Causes Act, 1899, s.16; Queensland Matrimonial Causes Amendment Act, 1923, s.3; South Australia Matrimonial Causes Act, 1929, s.43(1); Tasmania Matrimonial Causes Act, 1919, s.3; Victoria Marriage Act, 1928, s.75; and Western Australia Matrimonial Causes and Personal Status Code, 1948, s.14, replacing an earlier Divorce Amendment Act, 1911, s.6; New Zealand Divorce and Matrimonial Causes Act, 1928, s.12(1); Canada Divorce Jurisdiction Act, 1930, s.2.

proceedings for divorce in the state or province in which the husband was domiciled prior to the desertion. In the Australian states, the statutes proceeded in terms of continuing the wife's domicile while the Canadian Act made it a condition that the wife must be resident after desertion for two years in the province where she was deserted before she could institute divorce proceedings. The English statute neither gives the wife a separate domicile for divorce nor requires her to reside for any given length of time after desertion by, or deportation of, the husband. For purpose of convenience, therefore, it is proposed to describe the basis of the English courts' jurisdiction under this rule as the "last common domicile of the parties".

Finally, the jurisdiction of the courts in England was further extended in 1949 by section 1 of the Law Reform (Miscellaneous Provisions) Act. It was realised by the British Parliament that a woman domiciled in England prior to her marriage might marry a foreign domiciliary and reside with him in his foreign country. If her husband committed a matrimonial offence and then deserted her, she might return to England. But in England she could not obtain divorce and would have to find the country in which the husband had his new domicile - which might be impossible to locate. To meet such situation,[45] the Act gave the English courts jurisdiction to dissolve the marriage if the wife is resident in England and has ordinarily been resident there for a period of three years immediately preceding the commencement of the proceedings and

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45. See Reports of the House of Commons Debates on the Law Reform (Miscellaneous Provisions) Bill, 1949, vol.466 at p.2519. But the Bill as finally passed made it possible for any woman whose husband is domiciled abroad to come to England and obtain a divorce after three years residence. See below.

the husband is not domiciled in any part of the United Kingdom, the Channel Islands or the Isle of Man. This rule is now contained in section 40 (1)(b) of the Matrimonial Causes Act, 1965 - a re-enactment of section 18 (1)(b) of the Matrimonial Causes Act, 1950, which in turn was an incorporation of section 1 of the 1949 Act.

To recapitulate, it may be stated that, as a general principle, the basis of divorce jurisdiction in England is the domicile of the husband. The principle of domiciliary jurisdiction is, however, so weighted down by statutory exceptions in favour of the wife that the domicile rule has almost lost its practical significance, except for the husband who cannot even counter claim for divorce unless domiciled. These then are the rules which the Nigerian High Courts are to apply by virtue of section 4 of the State Courts (Federal Jurisdiction) Act and the High Court of Lagos Act, both of which provided that the jurisdiction of the High Court of a state in divorce and other matrimonial causes shall be exercised in conformity with the law and practice for the time being in force in England.

2. ANALYSIS AND CRITIQUE OF THE APPLICATION OF THE ENGLISH RULES IN NIGERIA

(a) Domicile

We have discovered in chapter one that each of the Nigerian states is a separate legal district or territory for purposes of private international law. It has also been pointed out in the second chapter that despite the uniformity of law on matrimonial causes relating to monogamous marriages, domicile as

basis of jurisdiction in matrimonial causes is, by virtue of section 101 (1)(f) of the Sheriffs and Civil Process Act, to be fixed within a state just like in other matters of personal status and that the position in Nigeria differs radically from that in other countries as Australia, Canada and South Africa where the two-dimensional concept of domicile has been accepted. Consequently, in Nigeria, a divorce suit founds a conflict of laws problem not only when the parties are foreigners but also when they come from a different legal territory within the country. The net result is that for interstate and international conflicts, the general rule is that the court should decline divorce jurisdiction unless the parties are domiciled within the geographical area of the state in which the court operates. This principle operates in each of the states as Federal common law since formation and dissolution of monogamous marriages are matters within the exclusive competence of the Federal Parliament.

Of course, it is beyond dispute in Nigerian law, like the English law, that the

> "domicile of the wife follows that of the husband and that the wife cannot have a domicile different from that of the husband while the marriage lasts". [46]

Indeed "a divorced woman retains her former husband's domicile until she changes it".[47] Little wonder then that an attempt by a deserted wife to establish a separate domicile for divorce purposes in the former Northern Region of Nigeria as opposed to the domicile of the husband in the former Eastern Region of Nigeria met with a woeful failure.[48]

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46. Machi v. Machi (1960) L.L.R. 103 at p. 104; Adeoye v. Adeoye (1962) N.N.L.R. 63.

47. Adeyemi v. Adeyemi (1962) L.L.R.70.

48. Arinze v. Arinze [1966] N.M.L.R. 155.

An unresolved problem in the concept of unitary domicile of husband and wife in Nigerian law is that of spouses to a polygamous marriage. The principle has, however, been held applicable to a polygamously married man and his two wives by the Sudanese High Court in Sudan Government v. Zahra Aman Hamid and Sudan Government v. Gumga Yassin Mohamed,[49] so that each of the wives takes the domicile of the husband on marriage. The Court of Appeal for East Africa in Maleksultan v. Sherali Jeraj[50] held that a Mohammedan wife acquired upon marriage the domicile of her husband with the result that only the court of Uganda, the domicile of the husband, had jurisdiction to grant a divorce decree. A petition presented by the wife in Tanganyika was therefore dismissed for lack of jurisdiction since the parties were not domiciled in that country. Similarly, in the Kenya case of Re Howison's Application,[51] it was stated, obiter, that the wife of a potentially polygamous marriage acquired upon marriage the domicile of the husband with the result that the common matrimonial domicile of the spouses governed the essential validity of their marriage. Finally, the Native Appeal Court of Southern Rhodesia in Thom v. Raina[52] unanimously held that where a man domiciled abroad contracts a polygamous marriage with a woman domiciled in Southern Rhodesia, the woman takes the domicile of the husband and must be prepared to accept the personal law of the husband and if possible return with him to his country of domicile.

No doubt, these foreign decisions are only of persuasive

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49. [1961] S.L.J.R. 207.
50. [1955] E.A.C.A. 142.
51. [1959] E.A. 568.
52. [1952] S.R.N. 294.

authority on the Nigerian courts; nevertheless, they show that there is nothing fundamentally wrong in applying the principle of unitary domicile to the husband and wife of a polygamous marriage provided that it is recognised that when the unity of the marriage is no more real or non-existent, as when the parties are living separate and apart, the wife of a polygamous marriage as well as of a monogamous marriage[53] should be allowed to acquire a separate domicile for purposes of matrimonial causes.

Not surprisingly, the principle of domiciliary jurisdiction in divorce has operated unfairly on parties to a divorce suit in Nigeria as was the case in England before the Parliamentary extension of divorce jurisdiction in favour of the wife. But in Nigeria, the hardship is not exclusively that of the wife whose husband deserts in one law district to settle in another jurisdiction in Nigeria or in a foreign country. The problem is more concerned with the wife who dutifully accompanied her husband from one state, usually the state of domicile of origin, to another Nigerian state where the parties established a matrimonial home but where they could not establish a domicile of choice, irrespective of several years' residence in such place, because of the excessive rigidity of the concept of domicile which, as we have seen, communal orientation has carried to rather intractable lengths. The hardship of the parties, especially the wife in this respect is her inability, after her husband had committed almost all the matrimonial offences under the law, to obtain a remedy at the new matrimonial home because the husband has not, and possibly could not, acquired a domicile of choice there as a result of the hierarchical and collectivist concept of the extended family which, as

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53. As suggested in chapter 2.

we have seen,[54] makes it difficult for a person to prove that he has made an intentional severance with his domicile of origin. In short, the principle of domiciliary jurisdiction has virtually given the husbands, once they depart with their wives from their domicile of origin to a new jurisdiction in Nigeria, a licence to take advantage of their matrimonial wrongs.

We have noticed some examples of these cases of hardship on the part of wives in our discussion on the concept of domicile in Nigeria. Thus, in the Northern Nigerian case of Okonkwo v. Eze[55] the parties were resident in Northern Nigeria for about three years. The petitioning wife was, however, unable to prove that her husband had changed his domicile of origin from another legal district in Nigeria to Northern Nigeria where the action was brought. The Chief Justice of Northern Nigeria said:

> "I am satisfied that the respondent /husband/ did commit adultery with Mkonyere Ani. But I am unable to give a decree, because in my view the case has not been shown to lie within the jurisdiction of this court."

In Adeyemi v. Adeyemi,[56] the husband was domiciled in Western Nigeria but resident in Lagos where a divorce suit was instituted by the wife on the ground of adultery. According to the findings of the judge,

> "the uncontradicted evidence of the petitioner and her witness appears to me to establish adultery between the respondent and the woman named beyond any question".

Yet regardless of the parties' residence in the Lagos state for over fourteen years, the learned judge was forced to dismiss the wife's petition because of lack of domiciliary jurisdiction.

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54. See chapter 2.

55. 1960 N.N.L.R. 80.

56. (1962) L.L.R. 70.

In Adeoye v. Adeoye,[57] a Northern Nigeria High Court case, the husband in a monogamous marriage was domiciled in Western Nigeria but had been resident in Northern Nigeria for about eight years. He not only committed adultery with another woman but in fact admitted that he had purported to legalise the illicit union with the second woman by marrying her in another Nigerian state according to customary law. In other words, the evidence of the husband not only constituted an admission of adultery but also an admission that he had committed a criminal offence under the Nigerian Marriage Act[58] by marrying another woman under customary law during the existence of a monogamous marriage with the petitioner. Since it was found that he still retained his domicile of origin in Western Nigeria, the court held that it lacked jurisdiction to entertain the petition presented by the wife on grounds of adultery and cruelty.

Other cases abound in which the principle of domiciliary jurisdiction had prevented the courts from reaching a just decision in individual cases.[59] We may however conclude the catalogue of hardships suffered by wives in Nigeria as a result of this principle by giving the facts and decision in another Lagos case of Machi v. Machi .[60] The facts as found by De Lestang, C.J., were as follows: The parties had their domicile of origin in Eastern Nigeria but had been resident in the Lagos state for the past sixteen years. There, in 1960, a divorce suit was instituted by the wife against the husband on ground of

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57. (1962) N.N.L.R. 63.

58. s.48. It would seem that such an act also constitutes the offence of bigamy under s.370 of the Southern Nigeria Criminal Code and s.384 of the Northern Nigeria Penal Code. See R. v. Princewell (1963) N.N.L.R.54.

59. See e.g. Uchendu v. Uchendu (1962) L.L.R. 101 and Arinze v. Arinze [1966] N.M.L.R. 155.

60. (1960) L.L.R. 103.

desertion. Some time in 1956 the husband left the matrimonial home and took away with him all his belongings, telling the wife to go her own way. Since then, i.e. over four years, he neither supported the wife and the four children of the marriage nor returned to them. Being abandoned in this way without means, it was not surprising that the wife, having met a man who was prepared to support her and her children, went to live with him. She had two children by that man, and wished the court to exercise its discretion in her favour so that she could marry him. It appeared that the husband was as anxious as the wife to put an end to a family unity which had certainly become odious in that he entered an appearance but did not defend the suit. In view of this total disintegration of the marriage, the Chief Justice was of the view that a decision better calculated to advance the happiness of the parties was to pronounce a formal wreck of the family unity by granting a decree. He said,

> "I would be prepared on the evidence to find desertion proved and to exercise discretion in favour of the petitioner". 61

But his hands were tied by the rule in Le Mesurier's case which gives exclusive jurisdiction to the court of domicile and which the "Court must apply" by virtue of section 16 of the High Court of Lagos Act. Though resident for sixteen years in Lagos, the wife's petition was dismissed since the husband was not domiciled in that legal territory.

In all the above cases, all the parties were Nigerians domiciled within some legal territory in Nigeria. The substantive law applicable to the dissolution of the type of marriage contracted by all the parties is the same throughout Nigeria,

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61. (1960) L.L.R. 103 at p. 104.

whether at the state of domicile or that of residence. This is by virtue of federal Acts which unified the law relating to the dissolution of monogamous marriage throughout the country. Furthermore, all the matrimonial offences proved by the wives to the satisfaction of the respective courts occurred at the state where not only the parties, but also their witnesses were resident. Hence it was more in the interest of the parties, as well as their witnesses and also the respective courts, for the suits to be brought at the court of the state, i.e. that of residence, where there is relative ease of access to the court and where the cost of securing the attendance of witnesses is minimal.

From all practical and theoretical considerations, it therefore becomes apparent that the strict adherence to the principle of domiciliary jurisdiction in Nigeria, at least for interstate conflicts, has become a matter of mechanical application of English conflict rule. It seems not to have been realised by the Federal Parliament which brought this absurd situation about and the judges who apply the rules to produce such palpable injustice, as instanced by the above cases, without raising a dissenting voice against it, that substantive law has a greater importance to the parties and the community as a whole than questions of jurisdiction, important as the latter might be in private international law. As aptly pointed out by Professor Graveson,

> "One cannot justify the preponderance of the question of choice of jurisdiction over choice of law or vice versa without some attempt to assess first the relative importance of the two questions. Procedure admittedly provides the frame for substantive law and fixes its pattern; but it is the substantive law which determines the right of individuals, even though such rights can only be enforced through procedural machinery. Substantive law is thus the end to which

> procedure is the means, and certainly in popular thought parties are more concerned that any dispute between them should be determined on the merits according to the substantive law properly applicable rather than that this court or that court should have exclusive jurisdiction." 62

In other words, the pertinent question being posed here concerning divorce jurisdiction is, does it matter at all where the machinery is put in motion provided that the correct law is applied? In view of uniformity of law on matrimonial causes relating to monogamous marriage in Nigeria, what is the point in causing an unnecessary hardship to the parties by requiring them to go to their state of domicile in order to obtain a divorce decree which could have been given on identical terms by the courts of the state where they are resident, more so when it is remembered that the pattern of these cases is that the state where the parties are resident constitutes the obvious forum conveniens for all concerned?

Viewed from the sociological aspect, in all the cases considered above, all the petitioners were wives who would have found it difficult to combine the cost of litigation with that of travelling to the state of domicile of the husband to start a divorce proceeding. This is due to the vast geographical extent of Nigeria[63] involving great distance between some of the states, the fact that the country is still an agricultural society where women are generally dependent on their husbands, and the absence of any system of legal aid for divorce or other civil proceedings. Taking into consideration all these factors,

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63. According to the 1952/53 Census, the area of Nigeria is about 356,669 square miles. This area roughly equals the "size of France, Belgium and the United Kingdom put together". See the British Govt. White Paper, Cmd. 6599 of 1945, p.1.

62. Graveson, "Choice of Law and Choice of Jurisdiction in the English Conflict of Laws" 28 B.Y.B.I.L. (1951) 273, at p. 286.

it is our view that the test of divorce jurisdiction even assuming that there is diversity of matrimonial laws, should be such as to ensure the application of the law of domicile to the parties at the state where they may be resident rather than requiring them to go to the court of domicile to obtain divorce. But before this point is developed further, it will be necessary to examine how far, if at all, the extension of divorce jurisdiction consequent on the adoption of the English enactment on this point has eased the hardships created by the rule that domicile affords true test for divorce jurisdiction.

(b) Statutory Extension of Divorce Jurisdiction in Proceedings by a Wife.

i. Last common domicile of the parties

The first of the exceptions to domicile as basis of divorce jurisdiction is now contained in section 40 (1)(a) of the English Matrimonial Causes Act, 1965. It provides that

> the English court shall have jurisdiction to entertain proceedings by a wife, notwithstanding that the husband is not domiciled in England (a) if the wife has been deserted by her husband, or (b) the husband has been deported from the United Kingdom under any law for the time being in force relating to deportation, provided that the husband was immediately before the desertion or deportation domiciled in England.

An important point to note in considering the operation in Nigeria of the above and the next provisions of the Act is that

> whenever any Act of [the United Kingdom] Parliament is extended or applied to Nigeria or to a State, such Act shall be read with such formal alterations not affecting the substance as to names, localities, courts, offices, persons, moneys, penalties and otherwise as may be necessary to make the same applicable to the circumstances." 64

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64. Interpretation Act, s.15, Cap. 89, Laws of the Federation of Nigeria, (1958) ed. This section, as well as few others, is preserved by the Schedule to the Interpretation Act, No.1 of 1964, which repealed most sections of the earlier Act.

There has not been any judicial decision on how this clause of the section should operate in Nigeria. The provision, however appears clear enough so that its construction presents no difficulty. There are two conditions either of which must have occurred before the court in England could assume jurisdiction to dissolve the marriage on a petition brought by the wife. These two will be treated separately in their operation in Nigeria.

Desertion

As regards the position in England, the first arm of this statutory rule gives jurisdiction to the English court on a wife's petition if she was deserted by her husband in England, where both parties must have been domiciled before the desertion, irrespective of the husband's acquisition of a new domicile in another country. It seems clear that desertion as used in this context has the ordinary dictionary meaning of "abandonment" and does not mean that the husband must have been guilty of the matrimonial offence of legal desertion for three years.[65] Secondly

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65. See Wolff, op.cit., (2nd ed.) p.374. But contra. Dicey and Morris, op.cit (8th ed.) p.300 and Kasunmu and Salacuse, Nigerian Family Law, p.121, where it was stated that the husband must have been "guilty of desertion" before the court of the last common domicile of the parties could assume jurisdiction on the wife's petition. These words do suggest that these learned writers construed the word "desertion" as used in the Act to mean legal desertion. It is however suggested that this interpretation seems not to follow. Otherwise, the purpose of the provision becomes frustrated if a wife who has been abandoned by her husband in one jurisdiction where the parties were domiciled immediately before the abandonment, were to wait for a period of three years before she could commence proceedings on a matrimonial offence, e.g. adultery or cruelty, committed by the husband either at the country of the last common domicile of the parties or in a foreign country where he is now domiciled.
The few English cases, viz. Zanelli v. Zanelli (1948), 64 T.L.R.556 and Sealey v. Callan /1953/ P.135, in which this provision had been applied do not present such problem. But the Australian view of a somewhat similar provision contained in its Matrimonial Causes Act, 1959 seems to

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since each of the countries in the political affiliation known as the United Kingdom is a foreign country to each other in which domicile should be fixed, the fact that a husband on deserting his wife acquires domicile in Scotland or Northern Ireland would not preclude the English court from assuming jurisdiction on the wife's petition on a ground arising in England before his departure or subsequently at the new domicile. This, as we shall observe, constitutes an important distinction between this and other provisions of the section.

By analogy, since each of the Nigerian states is a separate legal district in which domicile, even for purposes of jurisdiction in matrimonial causes,[66] should be fixed, it would appear that a desertion from one state where the parties were domiciled before the husband's desertion, to the other where he subsequently acquires a new domicile will give the court of the former state jurisdiction to entertain proceedings by the wife. Thus, for example, suppose H. and W. were domiciled in the Western state of Nigeria. The husband deserted the wife at this state and acquired a new domicile in the Kwara state. By virtue of this rule, the court of the Western state would be competent to assume jurisdiction on the petition presented by

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65. (continued) support the contention that desertion as used in the English Act means simply abandonment. Section 24(1) of the Act provides that "For the purpose of this Act, a deserted wife who was domiciled in Australia either immediately before her marriage or immediately before the desertion shall be deemed to be domiciled in Australia". In Buckner v. Buckner [1967] 11 F.L.R.468, the Supreme Court of New South Wales, in considering whether it had jurisdiction on a wife's petition based on cruelty and drunkenness, held that the phrase "a deserted wife" in the provision means a wife whose husband has wilfully abandoned or whose conduct has compelled the wife to live away from him. And that the phrase does not mean a wife whose husband has been guilty of the matrimonial offence of desertion for a given period. This view, it is submitted, is compatible with the English provision. See now Navas v. Navas [1969] 3 All E.R. 677.

66. s.101 (1)(f) of the Sheriffs and Civil Process Act.

the wife, e.g. on the ground of adultery committed by him before his desertion. There would be no need for her to follow the husband to the new state of domicile before she could institute divorce proceedings. The position would be the same if, instead of acquiring a new domicile in a Nigerian state, the husband acquired such domicile in a foreign country like Sierra Leone or England.[67]

The rule does not apply in the following situations. H. and W. were domiciled in the Rivers State but they have been resident in the Lagos State for the past five years without losing their Rivers domicile. H. subsequently deserted the wife in the Lagos State and resumed his domicile in the Rivers State. The Lagos Court has no jurisdiction under this rule since H. was not domiciled in the State immediately before desertion. Consequently, any divorce suit brought by the wife in this State must be dismissed for lack of jurisdiction.

H. who was domiciled in the Mid-Western State married W. in the Benue-Plateau State where W. was domiciled before the marriage. Both H. and W. resided in the Benue-Plateau State for some years after the marriage. Afterwards H. deserted W. in the Benue-Plateau State and acquired a new domicile in the Western State. The Benue-Plateau State Court has no jurisdiction under this rule since the husband was not domiciled at that state immediately before his desertion. Only the court of the Mid-Western State has jurisdiction even though W. may never have been there before.[68]

Neither does the rule meet the case of a Nigerian woman who married a foreigner and lived with him in his foreign country

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67. Cf. Zanelli v. Zanelli (1948), 64 T.L.R. 556.

68. Leon v. Leon [1967] P. 275.

of domicile and was there deserted. If the court of such country has no jurisdiction under such circumstances, the woman cannot resort to the court of her pre-marital domicile in Nigeria for matrimonial relief because the husband was not domiciled there at the time of desertion. It does not matter that the wife has no knowledge of the whereabout, and hence the domicile, of the husband.[69] Little wonder, then, that the learned editor of Dicey and Morris[70] wrote of this provision that

> "it does not cover a number of situations which judges had in mind when they suggested that an exceptional jurisdiction might be available to deserted wives."

Deportation

As regards the second condition that the husband must have been deported from the United Kingdom and immediately before such deportation he must have been domiciled in England, such condition is obviously satisfied in Nigeria if the husband was deported from the federation, the federation of Nigeria being equated with the United Kingdom for this purpose. In such situation, it would seem that the court of the state in which the husband was domiciled immediately before the deportation has jurisdiction to entertain a divorce suit instituted by the wife.

But unlike the situation in the United Kingdom, the Federal Government in Nigeria has the power of compulsory removal of an alien from one Nigerian state to the other.[71] Since section 15 of the Interpretation Act empowers the courts to read any English Act specifically adopted in Nigeria with such formal

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69. But see below under "Residence".

70. op.cit. (8th ed.) p.300.

71. Constitution of the Federal Republic of Nigeria, 1963, Schedule Part I, item 12 of the Exclusive Legislative List read with s.27 of the Constitution.

alterations not affecting the substance as to names, localities etc. and otherwise as may be necessary to make it applicable to the circumstances, the question might be raised as to whether the words underlined do permit the equation of the Federal Government's power of "compulsory removal from one territory to another" with deportation so that a wife whose husband has been so compulsorily removed would be entitled to present a divorce petition at the state in Nigeria where the husband was domiciled immediately before the compulsory removal. Since the hardship envisaged on the part of the wife in both situations is the same, i.e. the abrupt termination by the Government of the domicile of the parties in the state whose court would have had exclusive jurisdiction, and hence making it necessary for the wife to seek out the proper jurisdiction abroad, it would seem that the remedy provided in the case of deportation of the husband from the federation of Nigeria as a whole is equally applicable to the case where the husband was compulsorily removed from one state of the federation to the other. It is therefore submitted, not without some hesitation, that this interpretation is not more than a formal alteration of the word "deportation" so as to make it applicable to the circumstances obtaining in Nigeria as provided by the Interpretation Act.

ii. Residence of the wife in a State for three years.

The second statutory extension of divorce jurisdiction in favour of the wife is provided for by section 40 (1)(b) of the Matrimonial Act, 1965. This clause gives jurisdiction to the court in divorce and nullity proceedings

> when the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any part of the United Kingdom or in the Channel Islands or the Isle of Man.

The first case to consider the operation of this exceptional basis of divorce jurisdiction in Nigeria is Adeoye v. Adeoye,[72] In that case, the wife petitioned the Northern Nigerian High Court for the dissolution of her marriage to the respondent on grounds of cruelty and adultery. She alleged that both she and her husband were domiciled in the former Northern Region of Nigeria. On failure to prove that her husband had changed his domicile of origin from Western Nigeria to Northern Nigeria, it was argued on her behalf by her counsel that notwithstanding, the court had jurisdiction to entertain divorce proceedings on basis of the wife's continuous residence in Northern Nigeria for more than three years by virtue of section 18 (1)(b) of the English Matrimonial Causes Act, 1950[73] which the court was bound to apply as part of the Nigerian law. With this contention the learned judge disagreed. The judgment in the case however, shows some confusion as to whether the clause was considered by the judge as totally inoperative in Nigeria or that it could only be applied in certain circumstances which were not present in the case.

In considering the question, Skinner, J., (as he then was) observed that two distinct conditions must be fulfilled in England before jurisdiction could be assumed under the section. First, that the wife must be resident and have been ordinarily

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72. 1962 N.N.L.R. 63.

73. See now s.40 (1)(b) of the Matrimonial Causes Act, 1965.

resident in England for at least three years. He was prepared to equate England in the context of the Act with a legal district in Nigeria, in this instance, the former Northern Region of Nigeria. Secondly, the husband must not be domiciled in any part of the United Kingdom, or in the Channel Islands or the Isle of Man. Although the judge was prepared to equate United Kingdom with the federation of Nigeria, he, however, observed that Channel Islands and the Isle of Man constitute specifically distinct territories of the United Kingdom which have no equivalent in Nigeria. Consequently, he stated that the clause could not apply in Nigeria. On the other hand, he acknowledged that the position might be "otherwise where a husband is domiciled outside Nigeria" and the petition by the wife is brought at the state where she has been ordinarily resident for three years.

These rather conflicting views make it impossible to say whether the judge was excluding the application of the clause as part of the Nigerian law or merely stating that it only applies when the husband is domiciled outside the federation of Nigeria and the wife is ordinarily resident within a Nigerian state for three years.

Be that as it may, later decisions in Odunjo v. Odunjo[74] and Arinze v. Arinze[75] have clarified the position and held that the rule no doubt applies in Nigeria but that it could only be invoked to entertain divorce proceedings by a wife who has been resident for three years in a Nigerian state provided that her husband is not domiciled in any part of Nigeria. Thus in Becker v. Becker,[76] a German wife, resident in the Lagos State,

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74. (1964) L.L.R. 43.

75. [1966] N.M.L.R. 155.

76. (1964) Unreported, Nigeria Express, Jan.14, 1964; cited from Kasunmu and Salacuse, op.cit., p.125.

was domiciled in Germany. She instituted divorce proceedings in respect of her marriage with the respondent. It was held by the Lagos High Court that it had jurisdiction on the basis of her residence in the state for more than three years.

Finally, on the authority of the recent decision in Navas v. Navas[77] it would seem that the Nigerian courts would be able to entertain proceedings for divorce by a wife whose husband is domiciled outside Nigeria even if her three years' ordinary residence began before her marriage. In that case it was held that the three years' residence rule is not restricted to residence in England after marriage.

If the objection to section 40 (1)(a) of the Act is that it does not go far enough, the three years' rule provided as basis of divorce jurisdiction by section 40 (1)(b) of the Act goes so far as to attract wives having no previous connection with Nigeria. Since a stay always intended to be transient, at least if continuous for three years, must be regarded as sufficient under this rule, the provision could create each of the Nigerian states a "divorce mill" especially in favour of our Francophone neighbours, where following the French law, divorce could only be granted by the court of nationality of the parties. Indeed, as regards its operation in England, this exceptional basis of divorce jurisdiction was severely criticised by Sachs, J., in Tursi v. Tursi[78] where, in commenting on the predecessor of the present Act (i.e. section 18 (1)(b) of the Matrimonial Causes Act, 1950), he observed that the provision constitutes "a departure of a far-reaching nature" from normal rules of private

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77. [1962] 3 W.L.R. 437.

78. [1958] P. 54.

international law concerning divorce jurisdiction and that not unnaturally it has invited adverse comments from authorities on this subject in many countries.

> "It provides that women of all countries can, after three years' residence here, obtain a divorce under the law of this country irrespective of their domicile and irrespective of the fact that their husbands have never visited this country and have never had the remotest link with it. Its provision are thus calculated to attract to this country women who have been born, brought up, married and lived in the country of their husband's domicile, and to whom continued application of the matrimonial law of that country might not seem unduly unreasonable. It lays down that the courts of this country are thus to give decrees of divorce that, as in the present case, would not necessarily be recognised in the country of domicile, and may also not be recognised in many other civilised countries." 79

These criticisms arise because in creating statutory exceptions to the exclusive domiciliary jurisdiction in divorce, the Act at section 40 (3) also provides that the English domestic law and not the personal law of the parties should be applied. Thus in creating a wider basis of divorce jurisdiction the Parliament fails to provide for the application of the lex domicilii of the parties as in the case of the Indian and Colonial Divorce Jurisdiction Acts of 1926-1940.

Secondly, whether "ordinary residence" means something in addition to or something less than residence, pure and simple, is still a subject of controversy in English law. In Hopkins v. Hopkins,[80] Pilcher, J., held that residence for three months out of England by a wife, out of the three years required under the provision, precluded the court from assuming jurisdiction under the sub-section. Whereas in Stransky v. Stransky,[81] Karminski, J.,

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79. Ibid. at p. 60.

80. [1951] P. 116.

81. [1954] P.428 at p.437; See also, Lewis v. Lewis [1956] 1 W.L.R. 200.

held that absences of the wife from England for about 15 months on business with her husband would not necessarily break the period of ordinary residence of the wife in England. It would therefore seem that no assistance could be had from the English judicial authorities on this point at present.

Furthermore, these several statutory bases of jurisdiction contain a major defect. Stated in terms of their applicability in Nigeria, the rules enable only the wife whose husband is not domiciled in a legal territory in Nigeria, for one reason or the other, to bring proceedings to dissolve the marriage between her and the husband. But neither of the rules confer on such husband the right to bring a cross-petition or seek relief by way of an answer.[82] Thus for example, suppose that a Nigerian woman marries a foreigner whose domicile is in a foreign country and both have resided for more than 3 years in a Nigerian state. If the woman brings a divorce proceedings against the husband on a ground which the husband successfully defeats, the court of such state has no jurisdiction to entertain a cross-petition by the respondent husband even though such cross-petition could have established a valid ground for divorce. Since the parties would then still be married even though a valid ground exists on which the marriage could have been dissolved, the precise hardship purported to have been removed on the part of the wife would still be promoted by the refusal of the court to entertain jurisdiction on the cross-petition by the husband.

With these provisions may be contrasted a similar provision of the Canadian Divorce Act of 1968 which, after giving a married woman the right to acquire a separate and independent domicile for purpose of jurisdiction in matrimonial causes,[83]

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82. Levett v. Levett and Smith [1957] P.156 (C.A.); Russell v. Russell and Roebuck [1957] P.375.
83. S. 6(1).

empowers the Canadian courts to grant to the respondent spouse, whether husband or wife, who is domiciled outside Canada, the relief that might have been granted such spouse

> "if he or she had presented a petition to the court seeking that relief and the court had had jurisdiction to entertain the petition under the Act." 84

In other words, the artificial restriction developed in Anglo-Nigerian divorce proceedings that the court could only exercise extraordinary jurisdiction on the basis of the petition presented by a wife, to the exclusion of any cross-petition by the husband, is considered unnecessary under the Canadian Divorce Act. Consequently, a husband domiciled outside Canada who opposes a petition presented in Canada by his Canadian-domiciled wife, will be able to cross-petition for divorce if the ground alleged by the wife proves unavailing.[85]

Of course all these imperfections of the English law relating to the courts' jurisdiction in divorce are specifically adopted as part of the Nigerian law by virtue of the federal statutes which empower all the state High Courts to exercise their jurisdiction in conformity with the law and practice for the time being in force in England. Moreover, since the statutory extension of divorce jurisdiction in England is concerned with providing a solution for the problem of a unitary country, it is not surprising that the English solution has not entirely corrected the sort of hardship consequent at present on the principle of domiciliary jurisdiction at the interstate level. With the exception of section 40 (1)(a) of the 1965 Act

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84. Canadian Divorce Act, 1968, s.5(3)

85. This is also the position under s.4 of the South African Matrimonial Causes Jurisdiction Act, 1939.

which gives jurisdiction to the courts on a petition by a deserted wife, or if our suggestion that compulsory removal of an alien from one state to the other be equated with deportation for the purpose of this section is accepted, so that the court of the state where the husband was domiciled before he was compulsorily removed will be able to entertain proceedings by the wife, the adoption in Nigeria of these provisions constitutes a partial palliative for international conflicts, in that the rules mostly assist a wife whose husband is domiciled outside Nigeria. They provide a remedy for a problem which has not arisen in Nigeria but leave untouched the hardships noted in such cases as Okonkwo v. Eze,[86] Machi v. Machi,[87] Adeyemi v. Adeyemi,[88] Adeoye v. Adeoye[89] and similar cases. Hence the only people who had benefitted from the adoption of these provisions in Nigeria are foreigners like the parties in Becker v. Becker.[90] As regards conflict of jurisdiction between the Nigerian states, the rigour of domiciliary principle remains unabated. Thus, if a married woman whose husband is domiciled in neighbouring Dahomey crosses the border to the Lagos state and resides there for three years, the court of that state would have jurisdiction on her divorce petition regardless of the probability that such decree might not be recognised in Dahomey. But if such woman comes from any part of Nigeria hundreds of miles away, e.g. the Kano state, where the husband

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86. (1960) N.N.L.R. 80.

87. (1960) L.L.R. 103.

88. (1962) L.L.R. 70.

89. (1962) N.N.L.R. 63.

90. (1964) Nigeria Express, Jan. 14, 1964.

is domiciled, her residence in the Lagos state for however long, the facts that it is relatively more difficult for her (because of distance) than the Dahomian lady to bring proceedings in the court of domicile and that any decree granted by the Lagos state will certainly be accorded recognition in the Kano state,[91] will be of no moment to the Lagos court.

No doubt, this sort of situation constitutes the high water mark of mere conceptualism and reveals in a glaring manner the inappropriateness of foistering unmodified the jurisdictional rules of a unitary country on one that is a federation. In enacting these rules, the British Parliament did not consider for a moment their possible application abroad. Thus, for example, in answer to a question raised by a member of the United Kingdom Parliament that the predecessor of the rule now contained in section 40 (1)(b) of the Matrimonial Causes Act, 1965 should be extended to Scotland, the Lord Advocate pointed out that its applicability in that country had not been "

> "fully considered or discussed by responsible bodies in Scotland and that ... until that procedure has been followed, it was not possible to give any view as to whether or not it was desirable to provide a counterpart to the provision of the English clause for Scotland." 92

Not until the matter was remitted to the Standing Committee for Legal Reform in Scotland which considered the question and signified its acceptance to the proposal was a provision giving the Scottish courts jurisdiction to dissolve a marriage on the basis of the wife's residence in Scotland for three years was inserted as section 2 of the Law Reform (Miscellaneous Provisions) Act, 1949.

These obvious imperfections of the domicile rule and the

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91. See below.

92. House of Commons Debates, 1948-49, Vol.466 p.2506 et seq.

limited effect for interstate purposes in Nigeria of the statutory extension of divorce jurisdiction in favour of the wife would suggest that a more rational solution should be found to correct the hard injustice which the present bases of divorce jurisdiction have produced. It remains to add that if, as suggested above, the Nigerian law is brought into line with that of other countries which allows a wife living apart from her husband to acquire a separate domicile for purposes of jurisdiction in matrimonial causes[93] all the problems of deserted wife half-heartedly solved by the statutory extension of divorce jurisdiction will be susceptible of a simple solution and make the application in Nigeria of the English enactments otiose. A wife, living apart from her husband, whether as a result of his desertion, deportation, compulsory removal from one state to the other, voluntary or judicial separation would be able to acquire a separate domicile either at the interstate or at the international level for purposes of founding the jurisdiction of the court in divorce and other matrimonial causes.

3. SUGGESTION FOR DEVELOPMENT OF THE NIGERIAN LAW RELATING TO DIVORCE JURISDICTION

(a) National Domicile as Basis of Divorce Jurisdiction

It has been explained on the chapter on Domicile that a solution which has been adopted for interstate conflicts, after

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93. These countries are too numerous to be listed here. But see Legal Status of Married Women (United Nations Publication No. ST/SOA/35 of 1958) pp.10-14. Since the publication of this document, the following countries in the common law world, besides the United States of America where such principle has been applied for quite a long time, have adopted this principle: Australia, Matrimonial Causes Act, 1959, s.24 Canada, Divorce Act, 1968, s.6(1); New Zealand, Matrimonial Proceedings Act, No.71 of 1963, s.3.

See also s.8(3) of the Kenya Draft Bill on Law of Domicile which is yet to be implemented.

As regards the position of the law on this point in Nigeria see the postscript.

several experimentations, in some federations in the Commonwealth is to replace the concept of state or provincial domicile by a national domicile as basis of divorce jurisdiction so that spouses who establish domicile in the federation as a whole, as opposed to domicile in a particular state or province, are entitled to institute divorce proceedings anywhere in the federation.[94] Thus for international competence of the courts, domicile is provided as the jurisdictional base, but for internal competence it is considered necessary in each of these countries to qualify the concept of national domicile by imposing a further state or provincial residential qualification before such spouses are able to commence divorce proceedings in a particular state or province in the federation. In Australia, the residential requirement necessary is at least six months, while in Canada and South Africa, it should not be less than a year's residence.[95]

The idea of residence as a condition for access to the court of a state o r province, as the case may be, is probably imposed not necessarily to prevent forum shopping since there is uniformity of matrimonial law in each of these federal countries but presumably to ensure that a spouse does not take an unfair advantage of the other by starting a divorce suit in some distant place within the federation where he or she is certain the action could not be defended without serious financial hardship or loss of employment to the other spouse. In other words, residential qualification would seem to have been imposed so as to prevent the concept of National domicile as basis of divorce jurisdiction being used as an instrument of abuse and vindictiveness.[96]

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95. Though in Canada, actual residence in a province for at least ten months is deemed as constituting the requirement of a year's ordinary residence.

96. See e.g. Proceedings of the Canadian Special Joint Committee of the Senate and the House of Commons on Divorce, No.24 of 20/4/67 at p. 1465.

In view of the superficial attractiveness of the concept of national domicile as basis of divorce jurisdiction in a federation, this solution has been suggested in the form of obiter dicta by individual judges in Nigeria so that a person who is domiciled in Nigeria would be able to commence divorce proceedings anywhere within the country even though for purposes of other matters e.g. succession which is a state matter, his domicile will still be located in a state as at present.[97] Isolated statements by academic writers in support of this view have also been observed.[98] No one, including the present writer, will cavil at the demise of the unitary concept of domicile for all purposes in a federation if a two-dimensional concept will produce justice and remove the sort of hardships observed in the cases considered above.

But as the experience in other federations has shown, the concept of national domicile as basis of divorce jurisdiction is better designed to work well when there is a uniform federal law operating throughout the federation on a matter for which the concept is being employed. And such law is applicable to all and sundry who may be domiciled within such federal country. The effect of this is that wherever within the country a divorce suit is commenced the application by the court of the lex fori will coincide with the lex domicilii, i.e. choice of law problems will conveniently be swept under the carpet. This, to a certain extent, will no doubt be true if the concept of national domicile for purpose of jurisdiction in matrimonial causes is adopted in Nigeria since there is a federal law applying throughout

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97. Udom v. Udom (1962) L.L.R. 112 per Coker, J.; Odiase v. Odiase [1965] N.M.L.R. 196 per Fatayi-Williams, J.

98. See Graveson, op.cit., (6th ed.) p.188; Kasunmu and Salacuse, op.cit., pp.115-118; and Obi, op.cit., p.212.

the country but governing the dissolution of monogamous marriages contracted only by a limited class of persons in the country. Equally true is the fact that side by side with the law governing the dissolution of monogamous marriages is another relating to the dissolution of polygamous marriages. The preceding chapter has explained that there is diversity as regards details of such customary matrimonial laws. It is one system in the Western state, another in the Kano state, another in the Benue-Plateau state and so on - even if we ignore local variations within some of such states. For example, the Tiv Declaration of customary law on Divorce is radically different from that of the Idoma. The former contains specific grounds for divorce, while the latter empowers the courts to grant divorce without specifying any grounds. Like most systems of Nigerian customary law, divorce in Idoma area is permissible when the marriage has utterly broken down. Yet both these civorce laws operate within separate localities of the same Benue-Plateau state. To make the situation complex, it has been shown that in certain states, the only court having adjudicatory power over the polygamous marriage of non-Nigerian parties is the High Court since the customary courts have no jurisdiction over such parties. And that in the other states even where consent jurisdiction is given to the customary courts, it has also been shown that the jurisdiction of the High Courts is not ousted and that only the High Courts are better able to deal with problems of private international law that are bound to arise in such cases.[99]

With the dualistic system of matrimonial law in Nigeria (involving monogamy and polygamy) where one system is uniform throughout the country and the other heterogenous, and where the

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99. See above.

High Court of a state is competent to assume jurisdiction in matrimonial causes relating to both types of marriage in conflictual situations, the submission of divorce jurisdiction to a common Nigerian domicile will, at best, be an inadequate remedy and, at worst, an uncritical adoption of a solution adopted by other federations without relating such solution to the peculiar circumstances obtaining in Nigeria. Unless the High Courts would be expected to operate two-dimensional concept of domicile, a national domicile being the basis of jurisdiction for the dissolution of monogamous marriages and a state domicile being the jurisdictional base for the dissolution of polygamous marriages, in a single system of Nigerian private international law of husband and wife, the adoption of a national domicile as basis of divorce jurisdiction will still present the courts with the rather intractable problem of how to determine which of the diverse systems of customary law existing in Nigeria should regulate the dissolution of polygamous marriage over which they adjudicate. In other words, since the jurisdiction of the court would be found on domicile of the parties in Nigeria, what other point of contact should be employed to determine the applicable system of customary law.

An illustration will elucidate the point we are trying to make.

> Suppose a Ghanaian couple, domiciled in Ghana where they contracted a monogamous marriage came to Nigeria to settle. They lived first, in Benue-Plateau state for five years. But for the past 12 months they have established a temporary residence in Ibadan, Western Nigeria, where the wife instituted a divorce proceedings in the High Court on ground of adultery of the husband with another woman.

Under the concept of national domicile as basis of divorce jurisdiction, there seems to be no doubt that such parties would be held to have acquired domicile in Nigeria so as to enable the High Court to assume jurisdiction to dissolve the marriage. The problem of choice of law would not arise in view of uniformity of law relating to the dissolution of monogamous marriage in Nigeria.

But let us suppose that instead of the marriage being monogamous, it is polygamous. And instead of adultery being the ground for divorce, it is incompatibility of temperament. We may also assume that the parties are not Moslems. Under the concept of national domicile as basis of divorce jurisdiction, the Western Nigerian High Court would still be able to entertain the suit. However, the problem to be tackled by the court is whether to decree a divorce on the ground alleged, i.e. incompatibility of temperament. In the first place, it is self-evident that the court would consider it inappropriate to apply the uniform matrimonial law relating to the dissolution of monogamous marriages to divorce of a polygamous marriage when there are other more appropriate divorce laws i.e. customary divorce laws, applicable to the suit. But the vital question is, which customary law? Incompatibility is not a ground for divorce under the Marriage, Divorce and Custody of Children Adoptive Bye-laws Order which is now the basic customary divorce law in Western Nigeria. On the other hand it would be absurd for the court to dismiss the petition. Since the parties are "domiciled in Nigeria", it logically follows that they are subject to Nigerian divorce laws for the dissolution of their polygamous marriage. The most appropriate thing to do would seem to be for the court to find out whether any system of customary divorce law in Nigeria contains such divorce ground. If

the court looks hard enough, it would discover that the Tiv customary divorce law contains such a ground.[1] But what should be the connecting factor for determining such law.

Since the parties are "domiciled in Nigeria", domicile becomes impossible as a second test. Of course, it may be argued that domicile is the first of a cumulative test for indicating the personal law of a person under the common law, the second being determined either by religious adherence or other criterion like ethnic identity.[2] Thus when the parties are Moslems, adherence to the Moslem religion may be adequate as a second test for determining the personal law to govern the dissolution of their polygamous marriage. Fortunately for this purpose, it might be claimed that there is only one school of Islamic law, i.e. the Maliki school, obtaining in Nigeria. But religious adherence will not help in this kind of situation since the parties are not Moslems. Moreover, the Tiv customary law is not a religious one but a secular tribal law. The parties are foreigners who could not be linked with any particular tribal locality in Nigeria. Perhaps a possible suggestion might be the "mode of life" test adopted by the Northern Nigerian states[3] for determining whether a person is subject to "English law"[4] or customary law. But as pointed out by writers[5] on customary law,

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1. See Tiv Declaration of Customary Law relating to Marriage and Divorce, N.R.L.N. 149 of 1955, Schedule s.5(d).

2. See Bamgbose v. Daniel [1955] A.C.107 (P.C.); Kellewijn Conflict of Western and Non-Western Laws, 4 I.L.Q.307, cited with approval by Graveson, "Recognition of Foreign Divorce Decrees", 37 Tr. Gr. Sec. 149 at p. 154.

3. S.15, Northern Nigeria Native Courts Law, 1963 which has now been re-enacted in each of the six Northern Nigerian states as Area Courts Edict.

4. The term "English law" is here used to describe either the received common law of England or English statutes of general application in Nigeria.

5. See e.g. Keay and Richardson, Native and Customary Courts of Nigeria, p.176.

the concept is so vague and elusive that it often involves such imponderables as a person's social mores, educational or professional status, ability to speak a particular language, etc. Even then, it has been categorically asserted in a number of cases that there is no appreciable difference between the mode of life of the various communities in Nigeria.[6] Therefore, while the mode of life test may be adequate to determine whether an individual is subject to English law or customary law within a single legal district where both laws operate, it emerges clear that the employment of this test as a second connecting factor to determine which out of the various Nigerian customary laws of divorce should govern the dissolution of a polygamous marriage contracted by non-Nigerians will be difficult to operate if divorce jurisdiction is based on national domicile of the parties in Nigeria.

The main objection, therefore, to national domicile as basis of divorce jurisdiction in Nigeria stems from the failure of the proponents of such view to take into consideration the following facts which perhaps make the Nigerian situation a unique one calling for a special consideration. That customary law is equally an important part of the legal system of each state of Nigeria and consequently, there exists dualism of divorce laws in each of the legal territories in the country. That while there is uniformity of law on matrimonial causes in relation to monogamous marriage, the law in respect of such causes as regards polygamous marriage is diverse. That on both of these types of marriage, the High Court of a state is competent to assume

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6. Ekpo v. Kano Native Authority (1957) N.N.L.R. 129; Laniyan v. Isaac (1958) N.N.L.R. 119; Ogoja v. Adamawa Native Authority (1958) N.N.L.R. 35.

jurisdiction under Nigerian private international law. And that while national domicile as basis of jurisdiction to dissolve a monogamous marriage will make choice of law irrelevant, the adoption of such concept as the jurisdictional prerequisite for the dissolution of polygamous marriage will be fraught with acute problems of choice of law since there is no uniformity of law as regards the dissolution of such marriage.

On the other hand, under the concept of state domicile, it may be reasonable to conclude that the parties in the above hypothetical cases would be held to have acquired a domicile of choice in the Benue-Plateau state. Also, under the present law, the Western state High Court would certainly decline jurisdiction, whether to dissolve the monogamous marriage or the polygamous one, since the parties are domiciled in the Benue-Plateau state and only temporarily resident in the Western state. Nonetheless, the retention of the concept of state domicile yields a more predictable choice of law test as to the customary law of which state is applicable to the dissolution of the polygamous marriage. But to correct the hardship of the interstate level, of the principle of domiciliary jurisdiction, there seems to be no reason why jurisdiction in divorce should not be given to the courts of other states besides that of domicile.

This point was recently considered, in another context, by the House of Lords in the case of Indyka v. Indyka[7] where Lord Reid, in pointing out that domicile is not intrinsically an indispensable prerequisite to divorce jurisdiction, observed:

> "It would be quite wrong to exclude domicile as test, but once we get rid of the idea that there can only be one test and that there can never be jurisdiction in more than one court, it seems to me to be very much in the public interest that there should be some other test besides that of domicile."

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7. [1967], 3 W.L.R. 510 at p. 526.

In our view, his Lordship's statement is even more apposite to the unsatisfactory interstate position in Nigeria where, as shown above, citizens of Nigeria who have never lived a day out of the federation are unable to obtain divorce because of domiciliary jurisdiction.

The next question now to be considered, therefore, is how, by retaining the concept of state domicile, not only as basis of divorce jurisdiction but especially for choice of law purposes, we can ensure that anybody domiciled in a state of Nigeria would be able to institute divorce proceedings in any other Nigerian state where he lives, regardless of the fact that his domicile is not within such state and, at the same time, make sure that any decrees granted by some courts besides that of domicile will have extra-territorial effect outside Nigeria.

(b) Residence, the Status Theory of Divorce and Choice of Law

As pointed out above, the stated common law policy is that divorce is the antithesis of marriage and that the law that created the status of marriage should also abrogate the status. Thus, according to Lord Penzance in Wilson v. Wilson[8]

> "Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong." [9]

But where, it may be observed, the common law system as a whole appears to have gone wrong is that emphasis in private inter-

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8. (1872), L.R. 2 P. & D. 435 at p. 442.

9. See also the judgment of Brett, L.J., in Niboyet v. Niboyet (1878) 4 P.D.1 at pp.13-14 quoted above.

national law of divorce is strictly on the jurisdictional approach. In the attempt to achieve a complete harmony between choice of jurisdiction and choice of law, the common law has not completely weaned itself from the medieval English law approach whereby choice of jurisdiction invariably meant the choice of the particular municipal law obtaining at the place where jurisdiction is assumed. Consequently, Nigerian judges, like their contemporaries in the other common law countries, are mostly concerned with the question, which court has jurisdiction to decree a divorce with extra-territorial effect. Once jurisdiction has been assumed, the problem of which is the most appropriate law is resolved in favour of the lex fori.[10] Of course, where the court assumes jurisdiction on the basis of the parties' domicile at the forum, there is no denying the fact that the lex fori will coincide with the personal law of the parties.

One exception to the idea of linking jurisdiction with choice of law in divorce has been noted in the case of the Indian and Colonial Divorce Jurisdiction Acts of 1926-40. A second exception in the common law world, occurred in the Australian Matrimonial Causes Act, 1945.[11] Before the Matrimonial Causes Act, 1959 unified matrimonial laws in the Australian federation and provided that the concept of national domicile should be the basis of divorce jurisdiction in the country, the inadequacy of linking jurisdiction with choice of the applicable

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10. For example, s.40(2) of the English Matrimonial Causes Act, 1965 which constitutes the choice of law rule in divorce of monogamous marriage in Nigeria, provides that where the court assumes jurisdiction on basis other than that of domicile, the issue should be determined in accordance with the lex fori.

11. Matrimonial Causes Act, No.22 of 1945, s.12. The whole of the Act has now been repealed by s.4 of the Australian Matrimonial Causes Act, 1959.

law, thereby giving exclusive jurisdiction to the courts of the state where the parties were domiciled, was acknowledged and remedied. Instead of allowing choice of jurisdiction, exclusively at the forum domicilii, to carry with it the automatic application of the law of such jurisdiction as the personal law of the parties, the Australian Matrimonial Causes Act, 1945 separated the state having jurisdiction to entertain divorce proceedings from the state whose substantive law should be applied. In respect of any person domiciled within a state or territory of Australia, the Act, while preserving the common law principle of domiciliary jurisdiction, upheld, as an additional test, residence of the parties in an Australian state for a period of at least 12 months as basis of divorce jurisdiction.[12] But in compliance with the status theory of divorce, the Act went on to provide that the court of the state of residence should apply the substantive law of the state where the party instituting divorce proceedings is domiciled.[13] In other words, the court of the state where the parties were resident should grant divorce only on a ground recognised as sufficient by the law of the state where the parties were domiciled at the commencement of the proceedings.

Apart from these two legislative actions, neither legislature nor judiciary in the common law world is sympathetic towards this approach. Yet according to the better view,[14] the

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12. Ibid., s.10.

13. Ibid., s.11.

14. See Cook, opcit. pp.463-467, Graveson, 17 M.L.R. 509; B.Y.B.I.L. Vol.28 (1951) at p.279; 37 Tr.Gr.Soc.149, at p.169; Conflict of Laws (6th ed.) p.307; Prevezer, 7 Current Legal Problems (1954) p.118; Cowen, American-Australian Private International Law (1957) p.57; Cheshire, 61 L.Q.Rev.(1945) 352 at p.371; Report of the Royal Commission on Marriage and Divorce (1955) Cmd.9678, paras. 827-839; I.M. Sinclair, 30, B.Y.B.I.L. at pp.529-530; Lipstein, 2 Ottawa L.Rev. (No.1) (1968) 49 at pp.53 and 70.

essence of the status theory of divorce is not that the court but the law of domicile i.e. at common law the personal law of the parties, should govern the dissolution of their marriage. Thus, as the above enactments have shown, the principle of residential jurisdiction is not incompatible with the status theory of divorce provided that the personal law of the parties is applied. Indeed, commenting on the sufficiency of the Australian Act, Cowen said:

> "why, as a matter of common law, it was found necessary to reserve exclusive jurisdiction to the forum domicilii has never been clearly explained. There seems to be no good reason why jurisdiction could not have been assumed by a court having personal jurisdiction over both parties, subject to the application of the lex domicilii as a choice of law rule." 15

In most civil law countries where the status theory of divorce is also maintained, there is a fundamental divergence of approach from that of the common law.[16] First, it must be remembered that in most of these countries, matters of personal status are, as a general rule, governed by the principle of nationality as opposed to that of domicile as in the common law world. When one or both of the parties are nationals of the country in which divorce proceedings are commenced, the continental courts assume jurisdiction on basis of the nationality of such party or parties and apply the lex fori.[17] No doubt, when jurisdiction is assumed on this basis the lex fori will coincide, as in the common law, with the personal law of the parties. But unlike the common law, jurisdiction of the court of nationality is not exclusive. In addition, the civil law

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15. Zelman Cowen, op.cit., p.57.

16. For a detailed discussion on the bases of the continental courts' jurisdiction, see I Rabel, op.cit., pp.425-453.

17. Ibid., pp.459-461.

countries have long exhibited no lack of ingenuity in discovering grounds for exercising divorce jurisdiction when neither of the parties is a national of the country in which divorce proceedings are commenced. They indulge in liberal assumption of jurisdiction on basis of the parties' residence at the forum. However, being conscious of the inherent unpleasantness of "matrimonium claudicans" (limping marriages), they apply the personal law i.e. the lex patriae, of the parties or that of the husband (when the nationalities of the parties are different), either exclusively "with ordre public as a powerful and almost omnipresent corrective" as in France[18] or cumulatively with the lex fori as in Germany. Thus, for example, there are certain instances under which the German Code of Civil Proceedure[19] directs the German High Court (Landgericht) to assume jurisdiction on residential qualification where the parties to divorce proceedings are not nationals of the Federal Republic of Germany. To start with, the German courts will only assume jurisdiction if the lex patriae of the husband will recognise a German divorce decree. Thus by way of illustration, since the English or presumably, a Nigerian court would recognise a decree based on three years' residence of the wife in a foreign country[20] a German court would assume jurisdiction on basis of the wife's or the spouses' residence in Germany, if the husband is a United Kingdom national or a citizen of Nigeria.[21] If this condition is satisfied, then according to the Code of Civil Proceedure,

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18. See Donald von Landauer, 13 I.C.L.Q. (1964) at pp. 21-25; See also Wolff, op.cit., pp.372-373.

19. S.606b ZPO; See also Palandt, Kommentar Zum BGB, 1968 Munchen Zum EGBGB 17, Anm.6.

20. See Travers v. Holley [1953] P.246.

21. Cohn, 7 I.C.L.Q. (1958) 637 at p.644 et seq.

the court of the following places in Germany is competent to dissolve the marriage.

(a) The court in the area where the spouses have, or had their last, common habitual residence, or if this does not exist

(b) The court in the area in which either the defendant or the plaintiff had, or has, his or her habitual residence.

Dr. Cohn[22] observed of these rules that they give the German courts jurisdiction in many cases in which the parties have no substantial connection with Germany, but to ensure international recognition of decrees granted by the courts, the Code[23] provides that the applicable law shall be the lex patriae of the husband at the time divorce proceedings are commenced. However, divorce according to the personal law can only be granted by a German Court if the divorce is also possible according to German law.[24]

A similar solution as the German doctrine of cumulation, as it is often called, was recently proposed for England and Scotland by the Royal Commission on Marriage and Divorce.[25] The

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22. Manual of German Law, London, H.M.S.O. 1952, Vol.II, pp.22-23.

23. EGBGB, s.17. As a result of Art.3 of the German Constitution which provides for equality of men and women, it has been suggested by Prof. Kegel in his work, Internationales Privatrecht, 1964, Munchen, Berlin, p.291 that Art.17 of the Code should be repealed and the following choice of law rules, inter alia, be substituted
(a) the law of the common nationality of both parties, or
(b) the law of the last common nationality if still upheld by one of the parties, or
(c) the law of common habitual residence of the parties, or
(d) the law of the last common habitual residence of the spouses which is still retained by one of the parties, etc

24. ss 49-51 Ehe G. For this statement of the German law, we are grateful to Miss M.A. Wagenfeld, a German Scholar, who not only provided the relevant German authorities cited above but also translated them into the English language. From the above statement, it also appears that the position of the German law on this point has not changed much, if at all, since the publication by Cohn of the Manual of German Law, Vol.II in 1952. (See section on German Private International Law)

25. Cmd. 9678 of 1955.

first problem contended before the Commission and accepted by it was that undue hardship resulted from a rigid adherence to domicile as basis of divorce jurisdiction.[26] The Commission was of the opinion that domicile should continue as the main basis[27] but considered that there should be some relaxation of the strict requirement of domiciliary jurisdiction in order to bring the law in conformity with that of other European countries. It welcomes residence as basis of divorce jurisdiction but not without balancing such jurisdiction with the choice of law rule. In criticizing the present statutory extension of jurisdiction based on residence of the wife in England, it observed that a decree granted on such basis stands little chance of being recognised in foreign countries especially at the country of domicile or nationality of the husband.[28] This, according to the Commission, is because the English courts in exercising jurisdiction under the several statutory exceptions are required by statute not to pay any regard to the personal law of the parties but to apply the lex fori. Indeed, as recently pointed out by Lipstein, the problem involved in assuming jurisdiction on these statutory exceptions is not that of non-recognition alone, but also fundamentally affects the capacity of the husband whose marriage had been dissolved by English courts on the basis of the wives' residence in England, to contract other marriages, even under the same English law which determines capacity to marry by reference to the personal law of each of the parties. For if the divorce decree is not recognised by the

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26. Ibid. Para. 793.

27. Ibid. Para. 815.

28. Ibid. Paras. 822 and 828.

personal law of the husband, it naturally follows that such law would deny him capacity to contract a second marriage.[29]

Therefore, to deal with the problem of the deserted wife which the present English statute (and also Nigerian law) remedied rather unsatisfactorily, the Commission recommended that a wife who is living separate and apart from her husband should be allowed to claim a separate domicile for the purpose of establishing the court's jurisdiction to entertain divorce proceedings.[30]

Lastly, the Commission saw n o rational justification for perpetuating, without having a subsidiary rule, the principle of domiciliary jurisdiction which forges a link between jurisdiction of the court in divorce and the choice of the lex fori as the applicable law. There should, the Commission recommended, be additional jurisdiction to grant a divorce on basis of residence in the following circumstances so as to assist those persons who have to live in a country for some time but who have no intention of becoming domiciled there:[31]

i. When the petitioner is in England at the commencement of the proceedings and the place where the parties to the marriage last resided together was England, or

ii. When the parties to the marriage are both resident in England at the commencement of the proceedings.

But to ensure that any decree granted by an English court on basis of residence of either one or both parties is recognised

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29. See Lipstein, "Recognition of Foreign Divorces: Retrospects and Prosp ects" 2, Ottawa Law Review, No.1 (1968) 49 at pp.55-56.

30. Cmd. 9678 (1955) para.825.

31. Ibid. para. 831.

by the personal law, the Commission further recommended that the courts should not grant divorce when they assume jurisdiction under residential qualification unless

(a) the personal law or laws of both parties recognise as sufficient ground for divorce a ground substantially similar to that on which a divorce is sought in England, or

(b) the personal law or laws of both the parties would in the circumstances of the case permit the petitioner to obtain a divorce on some other ground.[32]

Thus, there are two choice of law approaches contained in the above recommendation of the Royal Commission. The first is the principle of cumulation or of coalescence i.e. the English court should not apply grounds recognised by the lex fori if unknown to the personal law. The other is the doctrine of exclusive application of the personal law i.e. the English court should apply grounds recognised by the personal law even though unknown to English law.

This novel recommendation is of special interest because it constitutes the first concerted effort by a judicial and juristic body, acting as law reformers of the English private international law of divorce,[33] to achieve a wider basis of jurisdiction in relation with choice of law rules that might entail application of a foreign system of law. The Commission's recommendation has not been implemented in England, but it is submitted that the problem confronting the Nigerian law in this

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32. Cmd. 9678, paras. 827-839, See also, the Royal Commission's Draft Code (Jurisdiction) and Recognition of Divorce at p.394.

33. But as regards jurisdiction of former Colonial Courts, see the Indian and Colonial Jurisdiction Acts, 1926-1940.

respect is obviously so pressing as not to justify delaying for any length of time the introduction of choice of law rules into the field of interstate validity of divorces.

(c) Conclusions

With the dualism of divorce laws in Nigeria and the diversity of one of its components, the question that should engage the attention of the High Courts and the law makers alike should not be which court has exclusive jurisdiction to decree a divorce, but how a wider basis of jurisdiction can be achieved and, at the same time, ensure that any decree granted by the courts of other states besides that of domicile will have extra-territorial effect. In view of the hardships resulting from strict adherence to the principle of domiciliary jurisdiction, the only means, it is submitted, to achieve this objective is by shifting emphasis from strict jurisdictional approach to more of choice of law. In other words, to give jurisdiction to the court of a state having personal jurisdiction over the parties but to require it to apply the personal law of such parties.

In adopting this approach, it should be borne in mind that there seems to be few, if any, other countries in the world, besides Nigeria, which operate a federal system of government - implying separarate legal territories - and at the same time have a dualistic system of divorce laws, and on both of which the High Courts are competent to adjudicate in conflictual situations. This rather unique position calls for a special treatment involving the untying of the Nigerian law from the conflict methodology of the English law, a unitary system of law, thereby putting it on the same basis as that of the civil law countries and the Australian Matrimonial Causes Act, 1945.

It is gratifying to note that this is the approach adopted by each of the former Regional legislatures in dealing with the jurisdiction of the customary courts in dissolving the polygamous marriages contracted by Nigerian parties. Nigerian parties from a "foreign" jurisdiction in Nigeria need not acquire a domicile of choice, or identity themselves with a new community in which they live, before they could commence divorce proceedings. The court of the area where they reside is required to assume personal jurisdiction to dissolve their marriage but to apply the "law binding between the parties".[34]

First, it is suggested that the concept of state domicile should be retained not only as basis of divorce jurisdiction as it is the position at present, but more importantly as a test by which the law governing the dissolution of a marriage can be determined. The jurisdiction of the court of domicile should, however, not be exclusive as it is at present.

Secondly, to remedy in advance the problem of the deserted wife (which has not arisen in Nigeria but which may present a major difficulty in the future) a married woman, living separate and apart from her husband should be allowed to acquire an independent domicile so as to found the court's jurisdiction to dissolve her marriage.[35] In exercising jurisdiction on basis of

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34. See s.20 of the Western Nigeria Customary Courts Law, Cap.31 (1959 ed.); s.15(a), Eastern Nigeria Customary Courts (No.2) Edict, No.29 of 1966; ss.20 & 21 Northern Nigeria States Area Courts Edicts. Cf. Osuagwu v. Dominic Soldier (1959) N.N.L.R.39. For this purpose, consistently with the principle of unitary domicile between husband and wife, the law binding between the parties should be the personal law of the husband, unless the parties are living separate and apart when, as suggested above, the wife should be free to have a different law for matrimonial causes.

35. A rule, which is slightly different from the one proposed, has been enacted in Nigeria. See Postscript.

the wife's separate domicile in a state, there seems to be no logical reason to engraft an artificial restriction on the husband who is domiciled in another state or foreign country to bring a counter-claim or cross petition if the wife's petition proves unavailing.

These two rules will apply both at the interstate and international levels, and once adopted, will make otiose the English statute extending the jurisdiction of the courts in favour of the wife. And with the abrogation of the enactments importing the English statutory bases of jurisdiction into Nigeria, all their imperfections noted above will be swept away.

Finally, for interstate conflicts only, and in respect of persons domiciled in any state of Nigeria, an additional basis of divorce jurisdiction should be given to the courts, making it possible for the court of the state in which the parties are resident at the commencement of the suit to dissolve their marriage. Consistently with the status theory of divorce, it will be necessary to provide that the court of the state having personal jurisdiction over the parties on basis of their residence there should apply the "English" or customary law of the state where the parties are domiciled, depending on whether the marriage is monogamous or polygamous.

With regard to the dissolution of monogamous marriages, this choice of law determinant will be a mere theoretical solution and will not be operated in practice because of the uniformity of federal law relating to divorce of monogamous marriages throughout the country. In all cases in which jurisdiction is assumed on basis of residence of the parties at the forum, the lex fori will invariably be the same as the lex domicilii so long as monogamous marriages and matrimonial causes relating

thereto continue to be a federal subject. The position would be similar to that under the various Legitimacy Laws[36] the identity of which has made choice of law, as regards interstate conflicts, unnecessary. Provided a person is domiciled within a state of Nigeria, it matters little whether the legitimacy law of a Northern Nigerian state or that of the Western state is applied as choice of law rule for the regulation of his statutory legitimacy. The great advantage making this innovation worthwhile in Nigerian private international law of divorce is that it will make impossible such unjust decision reached e.g. in Machi v. Machi[37] where jurisdiction to dissolve a Nigerian marriage which was conclusively proved to be beyond repairs was declined because the parties who had resided in the Lagos state for 16 years were found to have retained their domicile of origin in the former Eastern Region of Nigeria. Under the proposed jurisdictional base, the residence of such parties even for less than a year will enable the Lagos court to assume jurisdiction.

The significance of introducing choice of law rules into the field of divorce will be usefully felt in connection with the dissolution of polygamous marriages contracted by foreigners, since as we have seen, customary divorce laws are not uniform within Nigeria. If additional jurisdiction is taken on basis of residence of the parties in a state, then the customary law of the state of domicile of the parties would be applied as the substantive law for dissolving the marriage. In other words, whatever ground or reason[38] for divorce that is provided by that

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36. See ss.3 and 9 of the Legitimacy Laws.

37. Supra p.293.

38. e.g. Declaration of Biu Native Law and Custom Relating to Marriage and Divorce N.A.L.N. 9 of 1964, Schedule s.11(1), Laws of Northern Nigeria, 1964. "In any divorce proceedings instituted in Court by the husband for any reason other than desertion by the wife ..." This typical, albeit

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law will be used to dissolve the polygamous marriage by the court assuming jurisdiction on basis of residence.

Since this solution will be limited to interstate conflicts, there seems to be no cogent reason for applying the continental doctrine of cumulation, dependent upon a synthetical process which embodies both the application of the lex fori and the personal law. Indeed, it is rather inconceivable that the conception of public policy which is the foundation of the doctrine of cumulation in private international law would be allowed to come into full operation within the interstate sphere.[39] Moreover, besides some matters of detail, the policy consideration underlying the dissolution of polygamous marriages throughout Nigeria is fundamentally the same. Except in few localities,[40] the strict proof of divorce grounds is not necessary. Unlike the position with regard to monogamous marriages, the courts have no alternative but to dissolve or give judicial backing to a polygamous marriage which has irretrievably broken down or which has been unilaterally repudiated by the husband, the reasons for divorce being merely taken into consideration in awarding custody of the children or determining the amount of bride price

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38. (continued) recorded, customary law contains no divorce grounds but proceeded on the basis that a polygamous marriage could be dissolved on any reason establishing the total disruption of the marriage.

39. Most writers are critical of the employment of public policy in interstate cases. See e.g. Nutting, Suggested Limitations of the Public Policy Doctrine, 19 Minn.L.Rev. (1935) 196; Goodrich, Conflict of Laws (4th ed. by Scoles) p.4; Zelman Cowen, American-Australian Private International Law, p.8; Mr. Justice J.K. Beach, Uniform Interstate Enforcement of Vested Rights, 27 Yale L.J. (1918) 656 at p.662 where he stated that differences between the American States "relate to minor morals of expediency, and to debatable questions of internal policy. It would be an intolerable affectation of superior virtue for the courts of one state to pretend that the mere enforcement of a right validly created by the law of a sister state would be repugnant to good morals, would lead to disturbance and disorganisation of the municipal law or would be of such evil example as to corrupt the jury or the public ... as between this Union of states forming one

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repayable.[41] Consequently, the exclusive application of the personal law of the parties would in no way infringe the stringent public policy of the state granting divorce on basis of residence.

Finally, it will be worthwhile to consider briefly the alleged difficulty of proof of the lex domicilii, i.e. the personal law, when jurisdiction is assumed on basis of the parties' residence in one state to dissolve the marriage between domiciliaries of another state. This is the main criticism offered by Davies and Inglis[42] against the adoption of choice of law in divorce proceedings. Since residence as basis of divorce jurisdiction would be limited to the interstate sphere, this difficulty does not arise in Nigeria. To start with, it has been repeatedly stated that there exists uniformity of divorce law in relation to monogamous marriages throughout the country. Secondly, even in respect of polygamous marriages, on which there is diversity of divorce laws, this difficulty has been removed by section 73(1)(a) and (b) of the Evidence Act.[43] According to the provision of this Federal Act which is of undoubted validity throughout the federation, the following facts need not be proved before any court established in the federation:[44]

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39. (continued) nation, the only tolerable assumption must be that the laws of each state are well adapted to do justice and promote morality within their respective limits."

40. e.g. the Tiv Declaration of Customary Law, N.R.L.N. 149 of 1955 and the Western state of Nigeria Marriage, Divorce etc. Bye-Laws Order, W.R.L.N. 456 of 1958.

41. See Kasunmu and Salacuse, op.cit., pp.127 and 175.

42. In "Divorce, the Royal Commission and the Conflict of Laws", 6 Am.J.Comp.Law (1957) 215 at pp.219-222.

43. Cap. 62, Laws of the Federation of Nigeria, (1958 ed.)

44. However excluding the Customary and Native Courts, see s.1(4) of the Evidence Act. This is another instance of inadequate regulation of conflictual situations in Nigeria which must not be allowed to continue.

1. All laws or enactments and any subsidiary legislation made thereunder having the force of law now or heretofore in force, or hereafter to be in force, in any part of Nigeria.
2. All general customs, rules and principles which have been held to have the force of law in the Federal Supreme Court or former Supreme Court of Nigeria or by the High Court of the State and all customs which have been duly certified to and recorded in any such court.

The effect of this provision is that any decision made on customary divorce law by the court of one state in Nigeria need not be regarded as a foreign law that must be proved by expert evidence in another state. Similarly, any enactment or subsidiary legislation declaring customary divorce law, e.g. the Western Nigeria Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order and the Declarations of Customary divorce laws of the Tiv, Borgu, Biu and Idoma areas, shall be admissible as evidence of the law of such state by the other state. From the above provision, it becomes clear that the ascertainment of the customary divorce law of one state in the other becomes comparatively simple. Moreover, when the policy of incorporating customary laws into written form, which is gaining momentum presently in some of the states, is stepped up in the others, the problem of proof of customary law will be simpler still; since all that would be required when this goal is attained throughout the country is for the court of the state assuming divorce jurisdiction on basis of residence to consult the statute or subsidiary legislation of the state of domicile in order to ascertain the ground or reason for divorce that is applicable.

4. INTERSTATE AND INTERNATIONAL VALIDITY OF NIGERIAN DIVORCE DECREES BASED ON RESIDENCE

The sole reason for having a strict rule of jurisdiction in divorce proceedings is to ensure that a decree granted by the court of one country will be recognised in the others. As aptly put by Lord Watson in Le Mesurier v. Le Mesurier,[45] the lex fori may permit the assumption of divorce jurisdiction on an exceedingly wide range of grounds, but it does so at the risk of non-recognition abroad. In pointing out why domicile should be insisted on as basis of divorce jurisdiction, he observed that

> "When the jurisdiction of the court is exercised according to the rules of international law, as in the case where the parties have their domicile within its forum, its decree dissolving their marriage ought to be recognised by the tribunals of every civilized country." [46]

Hence if there is relaxation in the rules of recognition by foreign countries, such relaxation must be reflected in the rules for assumption of divorce jurisdiction by the courts of the forum since "both topics are branches of the same tree".[47] The aim of this section, therefore, is to show that a divorce decree granted on basis of residence as suggested above, will have equal validity at the interstate and international planes as one decreed by the forum domicilii and that strict adherence to the principle of domiciliary jurisdiction in divorce ought to have been supplemented by one that links residential jurisdiction with choice of law immediately Nigeria became a federation.

In so far as mutual recognition between the Nigerian states is concerned, this issue has been resolved by the Sheriffs and

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45. (1895) A.C. 517.

46. Ibid. at p.527. See also p.539.

47. Mann, 111 Recueil des Cours (1964), at p.75.

Civil Process Act,[48] the relevant provision of which is analogous to the full faith and credit provisions of Article IV, section 1 of the United States Constitution and section 118 of the Australian Constitution as implemented by section 18 of the country's State and Territorial Laws and Records Recognition Act. The effect of the Nigerian Act in relation to recognition of divorce between sister-states will be fully considered shortly, but in anticipation of a detailed discussion on this point, it may be briefly stated that the purpose of the Act is to compel the recognition of the judgments of the High Court and the Magistrates' courts of one state by the others. So if residence is provided as additional basis of divorce jurisdiction, there is no doubt that the decrees of the court of the state where the parties are resident would be recognised by that of the state of domicile of the parties or any other state court in Nigeria.

Flowing from this mutual interstate recognition of divorce decrees in Nigeria is the position at the international level, at least as far as the common law countries are concerned. Initially at common law, the narrowness of the principle of domiciliary jurisdiction was matched by a similar rigid approach to recognition of foreign decrees. But some years after the decision in Le Mesurier's case, a logical extension to domicile as the rule of recognition was made. In Armitage v. Attorney-General[49] the principle was established in England that a divorce decree obtained in the country where the parties were not domiciled will be recognised in England if it is considered valid

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48. See sections 104, 105 and 112.

49. [1906] P.135.

by the law of the country where the parties were domiciled at the commencement of the proceedings. In that case, an American citizen was temporarily resident in England but domiciled in the state of New York. He married in England an English lady. Some years later, the parties entered into a deed of separation and shortly afterwards the wife left England for the state of South Dakota in the United States, her main object in doing so being to institute divorce proceedings there. After residing in South Dakota for more than 90 days, she instituted divorce proceedings on the ground of desertion against the husband. A divorce was granted to the wife by the South Dakota Court. In considering what effect should be given tosuch decree in England, Sir Gorell Barnes found as a fact that the South Dakota divorce would be recognised in New York where the husband and wife were domiciled (in the English sense) at the time of the action. The court therefore held that since the marriage had been dissolved by a decree recognised by the lex domicilii of the parties with the result that they had ceased to be husband and wife according to their personal law, the decree should be recognised in England.

Commenting on the "considerable importance" of this rule, in so far as divorces granted by the courts of federal territories are concerned, the learned editor of Dicey and Morris observed as follows:

> "If a divorce is obtained in one state or province of these countries at a time when the husband is domiciled (in the English sense) in another state or province of the same country, and if the divorce is required to be recognised throughout the country, either by Constitutional law or by Act of /Federal/ Parliament, then it must be recognised in England." 50

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50. Dicey and Morris, op.cit. (8th ed.) p.311.

Besides the point that this common law principle has been followed in Scotland,[51] it has also been accepted either as judicial authority or recognised by statutes, in some Commonwealth countries, viz. Australia,[52] Canada,[53] New Zealand[54] and South Africa.[55] The same result has been reached in some States in America.[56] Moreover, it is inconceivable that other countries having the common law as the basis of their private international laws will find it difficult to accept a rule which, after all, "is a logical outcome of the status theory of divorce" and provides that the validity of divorce is a matter for the law of the domicile. Our conclusion is that there is no doubt that a decree granted on the basis of residence of the parties within a Nigerian state, since it would as a matter of course be recognised at the other Nigerian state where the parties are domiciled, would similarly be recognised certainly in the Commonwealth, South Africa, the United States of America and probably in other countries outside the common law world operating the concept of domicile as basis of the personal law.

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51. See e.g. Perin v. Perin (1950) S.L.T.51; McKay v. Walls (1951) S.L.T.6.

52. See Matrimonial Causes Act, 1959, s.95 (4).

53. Wyllie v. Martin [1931] 3 W.W.R.465; Walker v. Walker [1950] 4 D.L.R. 253; Jones v. Jones [1960] 25 D.L.R. (2D) 595.

54. Matrimonial Proceedings Act, 1963, s.83 (2)(c).

55. Guggenheim v. Rosenbaum (1961), (4) S.A. 21 (W).

56. E.G. New York, See Ball v. Cross, 231 N.Y. 329, 132 N.E. 106 (1921); Dean v. Dean, 241 N.Y. 240, 149 N.E.844 (1925); Gould v. Gould, 235 N.Y. 14 (1925). In the latter case, the New York Court recognised a French divorce decree granted to the American parties who were resident in France but domiciled in New York. The French court applied the New York law on divorce as the law of nationality of the parties following the French court's practice that each of the American States is a separate country for determining the lex patriae of American citizens. See on this point, Donald von Landauer, 13 I.C.L.Q. (1964) at p.33.

It must be conceded, however, that the adoption of residence, linked with choice of law rule, to achieve a wider basis of divorce jurisdiction in Nigeria would not operate as a complete solution for the problem of recognition abroad of Nigerian divorce decrees. In the first place, there is a general agreement that a divorce decree granted in Nigeria to parties who are nationals of Nigeria will be recognised by the civil law countries, both in Africa and the continent of Europe, where the principle of nationality is being operated to determine matters of domestic status. But it is unlikely that such decree would be recognised in a civil law country if it was granted to nationals of such country. Suppose, for example, an Egyptian married couple who are nationals of the United Arab Republic, acquired a domicile of choice in the Lagos State, but were resident in the Kano State. If the Kano State High Court assumed jurisdiction on basis of the parties' residence in that State and applied the Lagos law as the lex domicilii of the parties, it is almost certain that such decree will not be recognised by the Egyptian court of nationality of the parties since according to the Civil Code of Egypt[57] divorce is governed by the lex patriae of the husband. Of course, such decree would still not be recognised in that country if, instead of the divorce being granted by the State of residence, it was obtained in the Lagos State where the parties were domiciled at the commencement of the proceedings.

Until the difference of opinion between the countries employing nationality and those relying on domicile as basis of personal law is resolved, there seems to be no way out to this

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57. 1949, Art.13 (English Translation by Perrott, Fanner and Marshall).

problem except perhaps by International Convention.[58] It is however submitted that this theoretical[59] difficulty should not prevent the introduction of a much needed reform into the law on divorce jurisdiction in Nigeria in view of the hardships being caused to people by faithful adherence to the principle of domiciliary jurisdiction in interstate conflicts.

C. RECOGNITION IN NIGERIA OF FOREIGN DIVORCE DECREES

The problem of how far divorces granted in accordance with the law of legal districts other than that of the forum should be recognised as decisive of the status of marriage between the parties has a two dimensional aspect in the Nigerian private international law. The first deals with recognition by one Nigerian State of a divorce decree and other ancillary orders, e.g. obligation of support or custody of children, granted by another Nigerian State i.e. interstate recognition of divorce decrees. The other concerns the question of recognition by a State in Nigeria of divorces obtained under the law of a country outside Nigeria, i.e international recognition of divorces. Each of the two aspects of this topic will be considered separately.

1. INTERSTATE RECOGNITION OF DIVORCE

In considering what reform should be made as regards the bases of the courts' divorce jurisdiction, it has been pointed

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58. See e.g. The Hague Convention on the Recognition of Divorces and Legal Separations of October, 1968 in 18 I.C.L.Q. (1969) p.658 et seq.

59. In the sense that the number of people from the civil law countries resident, either temporarily or permanently in Nigeria, is rather insignificant. Compare Tables 17 and 18 of Nigeria, Annual Abstract of Statistics, 1963, p.26.

out that the question of mutual recognition of the judgments of the courts of one State by the courts of like jurisdiction in the others has been provided for by the Sheriffs and Civil Process Act.[60] This Federal statute is of undoubted validity throughout the federation but applies only to the judgments of the High Courts and the Magistrates' Courts.[61] For this purpose, the judgments of the Federal Supreme Court, given on appeal from the Court of Appeal or the High Court of State is deemed to be the judgments of the High Court of the State from which the appeal emanates and is entitled to recognition by the High Courts of the other States.[62]

Sections 104 of the Act provides that a judgment[63] given by the court of one state, if it is to be enforced in any other Nigerian State, must be registered in the court of like jurisdiction in the State in which the judgment is to be enforced. For purposes of registration, it is necessary for a certificate of judgment made in the appropriate form, containing the particulars of the judgment and issued by the registrar or other officer of the court which gave the judgment, to be produced by the person in whose favour the judgment was given. Upon production of such certificate to the recognising court, the officer of such court must register the judgment "forthwith" in the

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60. Cap.189, Laws of the Federation of Nigeria (1958 ed.) ss.104 and 105.

61. i.e. it excludes the judgments of Customary or Native Courts.

62. Sheriffs and Civil Process Act, s.112.

63. Which is defined in section 95 of the Act as including a judgment, decree, or order given or made by the court in a suit whereby any sum of money is made payable or any person is required to do or not to do any act other than

Nigerian Register of Judgments. The language of this provision would seem to make it clear that the officer to whom the certificate is produced has no discretion to refuse to register the judgment for any reason. Indeed, as regards section 21 (1) of the Australian Service and Execution of Process Act, 1901-1950 on which the Nigerian Act was based, it has been held by the Full Court of New South Wales in Ex Parte Penglase[64] that where a certificate of a judgment is produced to the proper officer in another Australian State, that officer is bound to register the judgment and has no discretion to inquire into the validity of the judgment. Finally, from the date of registration the certificate becomes the record of the recognising court and has the same force and effect as a judgment of that court.[65]

Thus even in the absence of a Full Faith and Credit provision in the Nigerian Constitution, the relevant provisions of the Sheriffs and Civil Process Act has dispensed with the question, as far as the superior courts are concerned, whether recognition of a sister state divorce should be predicated upon proof of proper jurisdiction in the original court. In other words, a divorce decree granted by the High Court of a State, whether pertaining to a polygamous or monogamous marriage, would necessarily enjoy equal validity in the courts of the other States without the recognising court re-examining, as at common law, the facts which gave the original court jurisdiction to grant a divorce decree.

The state of affairs brought about by the provisions of this Act would seem to explain why no reported case has been

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64. (1903) 3 S.R. (N.S.W.) 680; 20 W.N. (N.S.W.) 226.

65. Sheriffs and Civil Process Act, s.105 (2).

found in which a dispute as to the recognition by the High Court or the Magistrate's Court of the judgments or divorce decrees of the courts of the other State has been raised.[66] The position in Nigeria, with regard to interstate recognition of judgments therefore compares favourably with the situation in Australia[67] which commentators in other federations in the common law world have praised in an extra-ordinary way.[68]

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66. The case of Goodchild v. Onwuka [1961] All N.L.R. 163 is not in point since the decision in that case was concerned with the joint effect of the repealed Reciprocal Enforcement Ordinance, Cap.75, Laws of the Federation of Nigeria (1958 ed) and ss.104 and 105 of the Sheriffs and Civil Process Act.

67. For example in the Australian case of Harris v. Harris [1947] Vict.L.R.44, it was held that a New South Wales divorce decree which was final and conclusive should be recognised in Victoria even when it was clear, according to findings of the Victorian Court, that the parties were domiciled in Victoria at the date of the proceedings; whereas the New South Wales Court had assumed jurisdiction on basis of the parties' domicile in New South Wales. The decision in the case was reached by reference to s.18 of the Australian State and Territorial Laws and Records Act, 1901-1950 which provides, like the Nigerian Act, that the judgments of any state in Australia, if proved or authenticated as required by the Act, should have the same effect in all Courts in Australia as they have in the state of origin. The provision of this Act is further reinforced by s.94 of the 1959 Australian Matrimonial Causes Act.

68. E.g. United States of America. See Justice Jackson, "Full Faith and Credit - The Lawyers' Clause of the Constitution" in 45 Colum.L.Rev. (1945) 1 at p.34; Cook, op.cit. p.98; Cf. Griswold, Divorce Jurisdiction and Recognition of Divorce Decrees - A comparative Study" in 65 Harv.L.Rev. (1951) 193 at pp.220-223. Such favourable comments by American writers on the Australian approach is due to the fact that in the United States, the obligation imposed by Art.IV, s.1 of the American Constitution, to accord full faith and credit to the judgments of one state by the others is subject to a judicial qualification. According to the decision of the Supreme Court of America, in Williams v. North Carolina (No.2) (1945) 325 U.S. 226, when divorce jurisdiction is based on domicile of the parties in one state, the fact that the court decreeing the divorce found that the parties were domiciled within the forum at the time of the action will not preclude the court of the state recognising the decree from ascertaining whether the parties were in fact domiciled in the state where the decree was granted. If it found that they were not, recognition will be refused to the divorce decree.

A great flaw in the provision of the Sheriffs and Civil Process Act, as we have already pointed out in Chapter one, is that it does not apply to the judgments or decrees of the Customary Courts,[69] despite the provision of the Nigerian Constitution which empowers the Federal Authority to provide machinery for the mutual recognition of the judgments of "any court of law" in Nigeria. As regards this defect, it has also been suggested in the same chapter that there should be no discrimination against the judgments of the Customary Courts which, according to general agreement, determine the rights and duties - and hence the matrimonial rights and remedies of the preponderant majority of people in Nigeria.[70] On this point, nothing more needs be said here that to reiterate our suggestion that the provisions of the Sheriffs and Civil Process Act should be extended to cover the mutual recognition of the judgments of the Customary Courts interstate in Nigeria so as to bring the position in line with that obtaining between the superior courts.

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69. Supra p. 65.

70. Recent figures are not readily available, but to show what a very small percentage of cases come before the superior courts as compared with the Customary Courts even in 1949-1950 when the number of the Customary Courts was not as great as it is at present, attention may be drawn to the following figures.

In 1949, the Supreme Court (there being no High Court in Nigeria at that time) and the Magistrates' Courts tried in Western Nigeria as then constituted 11,607 criminal and 2,988 civil cases as compared with 34,000 criminal and 70,000 civil cases dealt with by the Customary Courts of that area. See Report of the Native Courts (Western Provinces) Commission of Enquiry, Lagos, Govt.Printer, 1952, paras. 89 and 90.

About the same year, there were 17,932 criminal and 5,427 civil cases determined by the Supreme Court and the Magistrates' Courts in Eastern Nigeria as against 40,000 criminal and 75,000 civil cases tried by the Customary Courts of that Area. See Report of the Native Courts (Eastern Region) Commission of Enquiry, Lagos, Govt.Printer, 1953, para.198c.

See also para.111 of the Report of the Native Courts (Northern Provinces) Commission of Enquiry, Lagos, Govt.

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Another problem of recognition interstate on which neither Constitutional law nor any Federal or State enactment is helpful concerns extra-judicial divorces. In most states in Nigeria, dissolution of polygamous marriages can be effected not only by the courts but also by the acts of the parties without the intervention of the courts. Of course, an extra-judicial divorce is as effective under the law of the State permitting such mode of dissolution as a divorce decreed by the courts. The methods by which an extra-judicial divorce may be effected will be considered under the following categories: (a) Unilateral repudiation by the husband, and (b) Consensual agreement between the parties.

Unilateral repudiation of the wife by the husband was almost a common method of terminating a polygamous marriage under the traditional customary law in the rare cases where efforts of the family members to preserve the marriage had failed. However, the establishment of regular courts coupled with the necessity to obtain ancillary reliefs, especially the custody of children of the marriage, would seem to have made this method of divorce less popular. Another deterrent is the rule in some customary laws providing for the forfeiture of the bride-price or dowry repayable by the wife on divorce if the husband should decide to end the marriage unilaterally.[71] Moreover, recent statutory modification of customary law in some States[72] has made extra-

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70. (continued) Printer, 1952, which stated that the greater majority of cases arising from that Region were tried by the Native Courts. According to this report, nearly 25,000 civil cases were tried between 1949-1950 in Northern Nigeria and out of this figure 66 per cent of such cases were concerned with matrimonial causes. See para.488.

71. See Kasunmu and Salacuse, op.cit., p.173.

72. e.g. Western Nigeria, See The Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order, W.R.L.N. 456 of 1958; See also the Tiv Declaration of Customary Law, N.R.L.N. 149 of 1955; Idoma Declaration of Customary Law, Schedule s.9, N.A.L.N.63 of 1959.

judicial divorces virtually impossible in such States. But under the Maliki law obtaining in most States of Northern Nigeria, a Moslem husband still has the right, which is seldom exercised,[73] to repudiate his wife for any reason whatsoever or even without just cause. This method of terminating a Moslem marriage is known as Talaq and it may partake of different forms.[74] This is also the position under some systems of customary law e.g. the Biu Declaration of Native Law on Divorce.[75]

By far the most common forms of extra-judicial divorce, especially under Moslem law, are those based on mutual consent of the parties. The first of the two types of consensual termination of a Moslem marriage is known as the KHUL' whereby a wife, e.g. as a result of her aversion to her husband, may obtain a release from the marriage by the payment to the husband of a financial consideration or by a return of the dowry paid on her behalf at the time of the marriage. The necessity for the husband's consent before a valid divorce could be obtained by the wife was recently emphasised by the Northern Nigerian Sharia Court of Appeal in Abdu Baffilace v. Rabi[76] where it was held that the court has no power to impose a divorce on the husband if he refuses to give his consent to the termination of the marriage on the payment of Khul' by the wife. A second form of extra-judicial divorce by agreement which is the variety of the Khul' is known

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73. See Anderson, Islamic Law in Africa, pp.209 and 213; Alhaji Suka, "Conflict of Islamic Law and Customary Law of Family Relations in Northern Nigeria", 1 Journal of the Centre of Islamic Studies, Zaria, Ahmadu Bello Univ.(No.1) at p.17.

74. See Anderson, op.cit., pp.213-214; Alhaji Suka, op.cit., pp.17-18; Ma'aji Shani, Digest of Maliki Family Law, pp.13-16

75. N.A.L.N. 9 of 1964, Schedule s.8(b) and (c), Laws of Northern Nigeria 1964, Vol.II.

76. SCA/CV17/1961, cited from the Journal of the Centre of Islamic Legal Studies Vol.1 (No.1) at p.45.

as the MUBARA'A. This is achieved by a mutual release by both spouses from the obligations of the marriage.[77] A slightly different version of these two modes of Islamic divorce is not unknown to some systems of customary law in Southern Nigerian states.[78]

With the above situation in view, it becomes readily apparent that since these unilateral and mutual divorces are neither granted by, nor ever required to be registered in, the courts before they become effective, they cannot be enforced interstate under the provisions of the Sheriffs and Civil Process Act, even if that Act is extended, as suggested above, to the judgments of Customary Courts. The danger therefore arises that these extra-judicial divorces, legally valid under the law of the State permitting them, may be refused recognition in another State where such unilateral or bilateral dissolution is no longer permitted. The best solution, it is submitted, that could be devised for this sort of problem would be to have a Full Faith and Credit provision in the Nigerian Constitution, or any Federal statute, compelling mutual recognition of such extrajudicial divorces interstate in Nigeria. This provision may be couched in terms of Full Faith and Credit being given by the courts of one State to the Laws, Judgments, Decrees, Orders or any Act recognised by law, of the other States. Such clause, besides continuing the mutual recognition of judgments of courts within Nigeria, would also permit recognition of extra-judicial divorce among the States as "an act recognised by law" in cases where such dissolution is permitted by the personal law of the parties.

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77. For a detailed discussion on this point, see Ma'aji Shani, Digest of Maliki Family Law, pp.13-16; Suka, Journal of the Centre of Islamice Legal Studies, Vol.1, pp.17-18.

78. See Kasunmu and Salacuse, op.cit., pp.172-175; Obi, op.cit., pp.364-365.

2. RECOGNITION OF FOREIGN DIVORCES

This topic is one on which, unlike the bases of the Courts' jurisdiction in divorce and other matrimonial causes, there is no comparable enactment authorising the Nigerian High Courts to adopt principles conformable to those being currently applied by the High Court of Justice in England. Nonetheless, the High Court of a State must of necessity take into consideration the English private international law rules on recognition of foreign divorce in formulating their own rules of recognition not only because of the close relationship existing between English jurisdictional rules which the Nigerian High Courts apply and the English rules of recognition.

In England, rules for recognition of foreign divorces are of judicial creation. The British Parliament has found it unnecessary to encroach on the power of judicial legislation of the courts in this respect. Rather, this power continues to be exercised from time to time both by the Court of Appeal and the House of Lords in England to take account of changes in the English domestic law on jurisdiction and contemporary developments in the private international laws of other countries.

We have noticed that common law principles, if established in England before 1st January, 1900, have authoritative effect in Nigeria, however, subject to the inherent power of the Nigerian courts to modify such rules to take account of local circumstances. If enunciated in England after this date, such rules have a persuasive influence on the Nigerian Courts as any other common law decisions. A key difference therefore between the operation in Nigeria of the English jurisdictional rules on divorce and the common law rules on recognition of foreign

divorce is that while the former cannot be modified with regard to their intrinsic substance, the latter is not so inhibited. It is needless to stress that this unsatisfactory position will make it almost impossible for the Nigerian courts to relate their jurisdictional rules with their rules of recognition - a proposition which is the foundation of private international law of divorce[79] - unless a decisive break is made with the English law on divorce jurisdiction.[80]

The problem of recognition of foreign divorce has not arisen in Nigeria. But this ought not to deter us from considering the problem in view of the great investment opportunities open to foreigners in Nigeria, making it possible for such persons who had settled or are merely resident in the country to enter into legal relations which may involve determination of the validity of divorces granted to them by the courts, or effected by them under the laws, of foreign countries. Furthermore, one of the consequences of the technological developments of the present era which has given rise to speed and ease of transport is that many Nigerians are now resident, either temporarily or for a long duration, in foreign countries. It is not inconceivable that the question of recognition of divorce decrees granted to them particularly under the present somewhat lax jurisdiction of some of such foreign courts will soon arise for determination by the Nigerian courts.

In case legislative activity is considered necessary in this field, a discussion about the rules of recognising foreign divorces will be prefaced with the observation that the same

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79. See e.g. Le Mesurier v. Le Mesurier (1895) A.C.517; Indyka v. Indyka [1967] W.L.R. 510 at p.557 (per Lord Wilberforce) and also at p.535; Graveson, op.cit., (6th ed.) pp.310-311; Mann, 111 Recueil des Cours (1964) p.75.

80. See now the Postscript.

dichotomy of legislative competence noticeable in all facets of matrimonial law in Nigeria is equally noticeable in the field of recognition of foreign divorces. That is to say, the Federal Authority is constitutionally competent to deivse rules for the recognition of foreign decrees dissolving monogamous marriages while each State is the sole arbiter of what rules should govern the recognition of foreign decrees or acts dissolving polygamous marriages.[81] Thus if legislation becomes necessary e.g. to implement an international convention on recognition of foreign divorces, or to modify the common law rules on this matter as in New Zealand,[82] a joint activity by both the Federal and States' authorities will be necessary; otherwise a unilateral enactment by the Federal or the State authority will only apply to the type of marriage which such authority is constitutionally competent to deal with.

(a) The Position Before 1953

It is unnecessary to dwell too much on the common law rules of recognition of foreign divorce decrees before 1953. The law was so consistent and well settled for over a century that no foreign divorce could be recognised as valid in England unless it has been granted by the court of the country in which the parties were domiciled at the commencement of the divorce

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81. Constitution of the Federal Republic of Nigeria, 1963, item 23 and 45 of the Exclusive Legislative List.

82. Where, before the decision of the House of Lords, in Indyka v. Indyka [1967], 3 W.L.R. 510 established nationality or citizenship as one of the tests for recognising foreign divorces, the New Zealand Matrimonial Proceedings Act, 1963, s.82 (1)(b) (ii) had adopted the same test, thereby modifying the common law on this point.

proceedings.[83] Later a logical extension of this rule was made to the effect that a foreign divorce pronounced by a court other than that of domicile would be regarded as valid if such decree would be recognised by the courts of the county where the parties were domiciled at the time of the suit.[84] This period was the heyday of the status theory of divorce when the narrow and rigid rule for assumption of divorce jurisdiction was matched with a similar rule of recognition and both reflected the common law attitude that matters of personal status are governed exclusively by the lex domicilii, i.e. the personal law.

Inseparably linked with the theory that the validity of divorce is determined by the personal law is another rule that, in considering the question whether recognition should be given to a foreign divorce, the English courts should not concern themselves with what ground was used by the foreign court to dissolve the marriage. As far as they are concerned the ground for divorce may well be one which is not permitted by English law.[85] What is material to recognition is that the divorce should have been granted by the court of domicile, or if granted somewhere else, must have been capable of being recognised by the court of domicile.

No doubt, these two rules of recognition should have equal validity in Nigeria since the Nigerian High Courts themselves exercise divorce jurisdiction on the basis that domicile

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83. Conway v. Beazley (1831) 3 Hagg.Ecc.639 at 658; 162 Eng. Rep.1292 at pp.1297-8; Tollemache v. Tollemache (1859) 1 Sw.Tr.557; Palmer v. Palmer (1859) 1 Sw.Tr.551; Shaw v. Gould (1868) L.R.3 H.L.55; Harvey v. Farnie (1882) 8 App. Cas.43; Le Mesurier v. Le Mesurier [1895] A.C.517.

84. Armitage v. Attorney-General [1906] P.135.

85. Pemberton v. Hughes [1899] 1 Ch.781; See also Mezger v. Mezger [1937] P.19; Bater v. Bater [1906] P.209 esp. at p.217.

is the test for determining matters of personal status, besides the point that the rule in Le Mesurier's case is a common law rule received in Nigeria as part of the common law of England as at 1st January, 1900 while the two-pronged rule established in Armitage v. Attorney-General, though decided in England in 1906, is a logical extension of the rule that the validity of a divorce is to be governed by the personal law of the parties.

An important qualification on the principle that domicile is the foundation for recognising foreign decrees is that although a divorce decree granted in accordance with the law of domicile effectively terminates the status of marriage between the parties, the decree does not necessarily preclude a fresh determination being made by an English court as regards ancillary rights, e.g. custody or guardianship of the children of the marriage, granted in such decree by a foreign court. Any foreign order to this effect may be varied or discharged at the discretion of a court in England.[86] The pragmatic explanation given for the doctrine that rights created by a foreign court in ancillary orders to a divorce should not be allowed to have an absolute sway in England, even if its divorce is recognised, should also provide a cogent reason why the practice of the Nigerian courts in this respect should not be different.

In England, foreign law is not applied in matters concerning guardianship and custody proceedings because of the close connection between these matters and the welfare administration.[87] Similarly in Nigeria, all the courts, whether the English type courts or the customary courts, are required by statutory

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86. See Dicey and Morris, op.cit., (8th ed.) pp.326-330.

87. Ibid.; See also Lipstein, 8 I.C.L.Q. (1959) 506 pp.513-514; Kahn-Freund, Growth of Internationalism in English Private International Law, (1960) p.65.

enactments[88] to pay regard to the interest and welfare of the child as the first and paramount consideration in any proceedings relating to his custody and guardianship. Hence a Nigerian court has the right, either of its own motion or upon the application by any interested party, to vary or discharge in the interest of the child, an order previously made by a court in respect of custody or guardianship of the child. In view of these wide discretionary powers of the courts to vary or discharge their own custody or guardianship orders, if such variation or discharge will be in the interest of the child, it is difficult to see how a Nigerian court will not consider it a duty to give similar treatment to the orders of foreign courts if it is in the interest and welfare of the child to vary or discharge them.

How far a foreign maintenance order or permanent alimony granted to a spouse in a divorce decree granted by a foreign competent court will be strictly enforced in Nigeria can only be surmised. The Federal Maintenance Orders Act[89] is not in point since it applies to few countries with which Nigeria has made a reciprocal arrangement for enforcement of such orders. Also it is limited in scope. Section 3 of the Act provides that an order made against a person in England, Northern Ireland or the Republic of Ireland[90] for the periodical payment of sums of

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88. See e.g. s.24 of the Infants Law of the Western and the Mid-Western States, Cap.49, Laws of Western Nigeria (1959 ed.); s.23 Customary Courts Law, Cap.31, Laws of Western Nigeria (1959 ed.); s.25, Customary Courts Law, Cap.32, Laws of Eastern Nigeria (1963 ed.); s.23 of the Area Courts Edicts of the Six Northern Nigerian States.

89. Cap.114, Laws of the Federation of Nigeria (1958 ed.).

90. The Act came into effect on 23rd June, 1921 when the Republic of Ireland and Northern Ireland constituted a unified country. Hence it would seem to apply to both countries after they separated in 1922.

money for the maintenance of his wife or other dependants may be enforced in Nigeria if registered in a Nigerian court. From the date of registration, such order has the same force and effect as an order granted by the court in Nigeria where it was registered[91] and is enforceable in like manner as if it were an order for the payment of a civil debt recoverable summarily.[92] It emerges clear from this provision that if the order is final and conclusive, it cannot be varied or discharged. Only when the order of the foreign court is provisional can it be varied or rescinded by a Nigerian court and then, after the case had been remitted to the foreign court which made the order for the purpose of enabling it to take further evidence on it.[93] That the Act is not designed for reciprocal enforcement of a maintenance order granted as ancillary relief to a divorce decree is clearly shown by its provisions. In the first place, it applies to the orders made by the High Courts as well as to orders made by Magistrates' Courts. (It may be recalled that the Magistrates' Courts do not grant divorce decrees at least in Nigeria and England). It speaks of a maintenance order granted to the "wife" and other dependants of the husband. Dependants are defined by reference to the law of the country where the order was made[94] but there is no such reference to the law of which country the word "wife" is to be interpreted. Thus when the parties had already been validly divorced e.g. in England or Northern Ireland where they were domiciled at the time of the proceedings,

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91. Maintenance Orders Act, s.3.

92. Ibid. s.7 (2).

93. Ibid. s.6 (6).

94. Maintenance Orders Act, s.2.

the wife would cease to be a wife from the time a divorce decree was made and become an ex-wife of the husband when enforcement of the order is sought in Nigeria. In fact the language of whole Act makes it glaring that the sole purpose of the enactment is to meet the situation where the spouses are still married and jointly resident in England, Northern or Republic of Ireland when the order was made and the husband subsequently became resident in Nigeria.[95] It does not contemplate a situation where the marriage had been validly dissolved by the court of domicile in either of these countries.

Be that as it may, it will be surprising, in view of the great disparity between standards of living and scales of values in the different countries of the world, if a Nigerian court does not consider it desirable in the interest of common sense and justice to vary the maintenance order or permanent alimony made by a foreign court if the rate of payment exceeds a maximum socially desirable or statutorily permitted in the country.[96]

If the above contention is correct, we would have come to an important distinction between interstate and international recognition of ancillary orders made in divorce decrees, since as has been pointed out, a decree or order of the court of one

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95. Ibid., esp. at ss.5 and 6.

96. Suppose that the wife of a man earning about £25 per week while he was in England was granted a maintenance of £8 in respect of herself and the only child of the marriage. It is submitted that it will be socially undesirable for such order to be confirmed by a court in Nigeria when the husband is now in Nigeria on a basic salary of £720 per annum, or £15 per week. Indeed, the English case of Wood v. Wood [1957] P.254, would also suggest that it lies within the discretion of the Nigerian court to vary or discharge such foreign maintenance order.

Nigerian State "whereby any sum of money is made payable", if registered according to the provisions of the Sheriffs and Civil Process Act, must be enforced in any other court in Nigeria as the judgment or order of the court where registration is effected.

(b) The Travers v. Holley Doctrine

In 1953, following the statutory extension of divorce jurisdiction in England, the unilateral rules that the English courts could exercise extraordinary jurisdiction on the wife's petition, to the exclusion of the husband, was enlarged by the courts into a bilateral rule of recognition so that recognition was accorded to a decree granted to a wife on basis of a foreign rule giving the court of such country jurisdiction to dissolve a marriage on a basis substantially similar to those of English courts.

The leading authority on this point is the Court of Appeal's decision in Travers v. Holley.[97] In that case two British nationals, immediately after their marriage in England where the husband had his domicile of origin, left that country in 1937 for New South Wales, Australia. In 1940, the husband obtained a commission in the Australian forces and later transferred to the British forces. Three years later, the wife filed a petition in the Supreme Court of New South Wales alleging that she had been deserted by the husband since 1940. The husband was served with notice of the petition but did not defend the action. Jurisdiction was assumed by the New South Wales court under the State's Matrimonial Causes Act, 1899, section

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97. [1953] P.246, followed in Carr v. Carr [1955] 2 All E.R.61.

16 (a) of which provided that a wife who, at the time of the suit, had been domiciled in New South Wales for three years may present a petition for divorce. For the purpose of this Act, a deserted wife whose husband was domiciled in New South Wales with the wife before his desertion, was deemed to have retained her domicile in the State even if the husband had subsequently after his desertion acquired a new domicile abroad. The New South Wales court, having found that the wife was domiciled in the State as provided by the Act, accordingly granted her a divorce decree. Both the husband and the wife later remarried, the husband in England and the wife in the State of Michigan, in the United States. The second marriage of the husband in England proved unsatisfactory and he brought proceedings for divorce against his first wife on the ground of her adultery with her second husband. In other words, he was alleging the invalidity of the New South Wales divorce because he was not domiciled there at the commencement of the proceedings, so as to enable him to show that his second marriage was a nullity.

By a majority of two to one, the Court of Appeal held that immediately before the husband's desertion he had acquired a domicile of choice in New South Wales. It was however doubtful whether the husband still retained his domicile in that State at the commencement of the proceedings. A decision on this point was considered unnecessary since the decree, even if not granted by the court of domicile of the husband, was based on a jurisdiction substantially similar to that being exercised by English courts by virtue of section 13 of the Matrimonial Causes Act, 1937 (now section 40 (1)(a) of the Act of the 1965 Act). The court therefore held that it would be inconsistent with comity and contrary to principle if English courts refused to recognise

a decree granted by a foreign court whose jurisdiction was based, mutatis mutandis, on one that the English courts claim for themselves.

The principle of recognition established in this case was later extended in Robinson-Scott v. Robinson-Scott[98] to a case where the foreign court assumed jurisdiction on a basis substantially similar to the provision of section 1, Law Reform (Miscellaneous Provisions) Act, 1949,[99] i.e. residence of the wife for three years in England.

Many difficulties lay in the way of the principle established in Travers v. Holley at its inception which developments by subsequent cases have clarified as will be presently shown. The doctrine itself has been the subject of considerable discussion not only in legal treatises[1] but also in legal periodicals.[2] We need only to set out the salient points in our critical re-appraisal of the doctrine with a view to considering how far the bilateral rules of recognition developed in this and other cases should be allowed to operate in Nigeria.

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98. [1958] P.71.

99. Now section 40 (1)(b) of the Matrimonial Causes Act, 1965.

1. Dicey and Morris, op.cit., (8th ed.) pp.312-315; Cheshire, op.cit., pp.342-346; Graveson, op.cit., (6th ed.) pp.314-319.

2. Sinclair, 30 B.Y.B.I.L. (1953) 527; Kennedy, 31 Can.Bar. Rev.(1953) pp.799 and 1079; 32 Can.Bar.Rev. (1954) 359 at p.362; Gow, 3 I.C.L.Q. (1954) 156; F.A. Mann, 17 M.L.R. (1954) at p.79; Blackburn, 17 M.L.R. (1954) p.471; Graveson, 17 M.L.R. (1954) p.509; Griswold, 67 Harv.L.Rev. (1954) 823; Russell, 5 I.C.L.Q. (1956) 126; Cowen, 31 Aust. L.J. (1957) 8; Webb, 6 I.C.L.Q. (1957) 608; 7 I.C.L.Q. (1958) 374; Cohn, 7 I.C.L.Q. (1958) 637; Kahn-Freund, Growth of Internationalism in English Private International Law (1960) pp.26-34; Castel, 45 Can.Bar.Rev. (1967) 140; Webb, 16 I.C.L.Q. (1967) 997.

In deciding whether a foreign court had proper jurisdiction entitling its divorce decree to be recognised under this principle it has been decided in subsequent cases[3] that it is no longer necessary to demand substantial identity between the foreign jurisdictional rule and that of the English courts. Provided that the circumstances under which the foreign court assumed jurisdiction was factually similar to the basis of divorce jurisdiction in England, such foreign divorce decree must be recognised. Thus in Robinson-Scott v. Robinson-Scott[4] the Swiss court's basis of jurisdiction in dissolving the marriage between the parties was the separate domicile of the wife in Switzerland. On finding that the wife had in fact resided in Switzerland for not less than three years immediately before the commencement of the divorce proceedings there, Karminski, J., held that the facts before the foreign court were such that had they occurred in England, an English court would have exercised jurisdiction to dissolve the marriage on a petition presented by the wife. He therefore recognised the Swiss divorce decree not because it was granted by the court of the separate domicile of the wife (a concept which is not permitted by English law) but because of the equivalence in the facts giving the Swiss court jurisdiction and the basis of the English courts' jurisdiction under section 18 (1)(b) of the Matrimonial Causes Act, 1950. Hence it is the factual circumstances of the foreign jurisdiction rule that is important for purpose of recognition under this principle.

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3. Arnold v. Arnold [1957] P.237; Robinson-Scott v. Robinson-Scott [1958] P.71; Manning v. Manning [1958] P.112; Brown v. Brown [1968] 2 W.L.R. 969.

4. [1958] P.71.

It may be recalled that the decision in Travers v. Holley[5] proceeded on the ground that comity demands that a divorce decree granted by a foreign court exercising similar jurisdiction as the one claimed by the English courts should be recognised in England. The decision has recently been disapproved of on this ground by the House of Lords in Indyka v. Indyka.[6] In showing that this basis of the decision was faulty, the House was of the view that the mere fact that English courts recognise foreign decrees granted on a jurisdictional fact as the English courts themselves exercise, does not imply that a decree granted by an English court on a jurisdictional basis factually or substantially similar to that of a foreign court would be recognised by such foreign country.

According to Lord Reid, "comity" in the sense of

> "if you will recognise that we have this jurisdiction we will recognise that you have a similar jurisdiction has never been the basis on which we recognise or give effect to foreign judgments." [7]

He concluded by saying that it would be quite unrealistic to suppose that when Parliament entrusts new jurisdiction to English courts, it has any intention to affect their rules for recognising foreign judgments.

In Levett v. Levett,[8] by an inductive approach, the unilateral rule that the English courts could exercise extraordinary jurisdiction only on a petition by a wife, to the exclusion of any cross-petition by the husband, was engrafted by

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5. [1953] P.246.
6. [1967] 3 W.L.R. 510.
7. [1967] 3 W.L.R. 510 at p.518.
8. [1957] P.156.

the Court of Appeal on the exceptional rule of recognition enunciated in Travers v. Holley.[9] In that case, an English soldier domiciled in England married in Germany, a German girl domiciled in Germany. They lived together for a time in England before the wife in 1952 left the husband to live in Germany. Less than a month after her arrival in Germany, she presented a petition to the appropriate German court praying for a dissolution of the marriage on the ground of her husband's cruelty. The husband cross-petitioned for divorce on the ground of the wife's adultery. The wife decided not to proceed with her petition and the German court, applying the English law as the personal law of the husband, found that the wife's adultery was proved and accordingly granted a divorce decree to the husband. In England the husband asked for a declaration that the German decree had effectively dissolved the marriage.

In considering whether the German decree should be recognised in England under the doctrine of Travers v. Holley, the Court of Appeal found it unnecessary to decide under what circumstances the foreign court assumed jurisdiction even though it was established by expert evidence that the German test was the ordinary residence of the wife in Germany with no period of time stipulated. The court held that in so far as the statutory exceptions to divorce jurisdiction of the English courts, on which the doctrine of Travers v. Holley is based, only affords a wife to petition for divorce in England to the exclusion of the husband, so also must recognition of a foreign jurisdiction factually similar to that of the English courts be limited to a decree granted to the wife. Therefore the decree granted to the

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9. [1953] P.246.

husband by the German court must be refused recognition irrespective of the fact that he was merely a respondent to the action brought by the wife in Germany. Whether a decree granted to a husband in circumstances as occurred in this case will now be recognised in England in view of the new rules established by the House of Lords in Indyka v. Indyka will be considered below.

(c) Recent Trends in England

An important point on which there had been a cleavage of academic opinion was whether the doctrine in Travers v. Holley could have a retrospective effect so as to enable a foreign decree that had been granted before the statutory extensions of English courts' jurisdiction to be recognised in England.[10] This point was the main issue in Indyka v. Indyka.[11] In that case, a wife who was a national of, and had always lived in, Czechoslovakia but whose Czech husband had acquired a domicile of choice in England in 1946, was granted a divorce by a court in Czechoslovakia in January, 1949 on the ground of deep disruption of marital relations. The decree became final in February, 1949. The precise basis of jurisdiction of the Czech court was not known, though there was no dispute before the court

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10. For example, Dr. J.H.C. Morris in 15 I.C.L.Q. (1966) 422 at p.425 said: The foreign divorce which was recognised in Travers v. Holley on the analogy of the English statute of 1937 had been granted in 1943. The question therefore arises, would the decision have been the same if the divorce had been obtained before 1937? Since the decision would have been inconceivable before the statutory change made in that year, it is submitted that on principle no divorce granted before 1937 or 1949 as the case may be should be recognised in England under the doctrine of Travers v. Holley. With this submission other writers in the Commonwealth disagreed. See e.g. Grodecki, 35 B.Y.B.I.L. (1959) 58 at p.62; Kennedy, 32 Can.Bar.Rev.359 at p.367; Cowen and Da Costa, Matrimonial Causes Jurisdiction (1961) p.86; Webb, 7 I.C.L.Q. (1958) 383-384; Castel 45 Can.Bar.Rev. (1967) 140 at pp.153-154. In Arnold v. Arnold [1957] P.236, the retrospective effect of the rule was assumed without discussion by Mr. Commissioner Latey.

11. [1967] 3 W.L.R. 510.

that the Czech court had jurisdiction. Lord Reid thought that the jurisdiction of the Czech court was based on the spouses' Czechoslovakian nationality or the wife's residence in the country.[12] The other Lords took it that the Czech court assumed jurisdiction on basis of the parties being Czech citizens. In 1959, the husband went through a ceremony of marriage with a second wife in England and six years later, the second wife petitioned for dissolution of the marriage on the ground of her husband's alleged cruelty. In reply, the husband claimed that the second marriage celebrated in England was void for bigamy in that the Czech decree of January, 1949 which purported to dissolve his marriage was not valid in England as he was already domiciled in England long before the Czech proceedings were commenced. In short, that from the view-point of English law he was still married to his first wife.

This contention was accepted by Latey, J., who accordingly pronounced the second marriage null and void. On appeal this decision was reversed by a majority decision, Russell L.J., dissenting. It should be pointed out at this juncture that the court below found as a matter of fact that the husband, contrary to the Czechoslovakian court's decision, did not desert his wife in Czechoslovakia but in fact requested her to join him in England, a request which she declined. So it was clear that the decree could not be recognised as being based on a jurisdictional ground similar to the statutory extension first given to the English courts by the Matrimonial Causes Act, 1937. The question presented to the House of Lords therefore, was whether the Czech decree should be recognised as having been based on a

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12. Ibid., at p.515.

jurisdictional requirement factually matching the other exceptional jurisdiction being exercised by the English courts under the Law Reform (Miscellaneous Provisions) Act, 1949 bearing in mind the fact that that Act came into operation in December 1949 whereas the Czech decree was granted in January of that year. In other words, the main issue in Indyka v. Indyka was whether recognition of a divorce decree by a foreign court on an analogous basis as the 1949 Act should be retrospective or prospective.

This point was summarily dismissed by all their Lordships whose unanimous decision was that the Czech decree should be recognised retrospectively. Lord Pearce stressed the point that the facts which compelled Parliament to give English courts wider jurisdiction in the interest of the wife existed in January 1949 when the Czech decree was granted though those facts were not statutorily acknowledged in England until December of that year. He pointed out further that the ground of recognition rests not on any exact measure of English courts' jurisdiction but on a wider ground of the public policy of English law, of which the domestic basis of jurisdiction was a most important element. He concluded by saying that

> "whether a foreign decree should be recognised should be answered by the court in the light of its present policy regardless ... (with reason) of when the decree was granted." 13

Lord Wilberforce was of the view that "the crude facts speak strongly in favour of recognition"[14] of the Czech decree and observed that the rule in Travers v. Holley should not be taken as a "cast-iron rule" to be applied on a "quasi-mathematical" basis.[15] The fact that the Czech decree ante-dated by a few

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13. [1967] 3 W.L.R. 510 at p.546.

14. Ibid. at p. 546.

15. Ibid. at p. 559.

months the statutory extension in 1949 of the English Courts' jurisdiction was also dismissed by the other members of the House as not fatal to its recognition.[16]

Besides the specific approval given by the majority of the House to doctrine of Travers v. Holley,[17] the decision in Indyka v. Indyka is also significant in another respect. In the words of Webb, it completely revolutionalised the whole basis of recognition of divorce decrees and thus rendered the decision a cause celebre of the century.[18] In stressing the historical point that the British Parliament has rarely intervened in the judicial evolution of rules regarding recognition of foreign divorces, their Lordships took the opportunity presented by the case (a) to re-interpret precedents on recognition and (b) to lay down new rules for testing the validity of foreign divorce decrees granted to the spouses, especially the wife, by a court other than that of the domicile of the husband, which in English law always represents the domicile of the wife.

To start with, it was agreed by all their Lordships that the basic rule that recognition should be given to a decree granted to either spouse by the court of the country in which they had their domicile should be maintained.[19]

Secondly, there was unanimity that the world is almost equally divided between systems of law operating the principle

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16. Ibid. at p. 533 (per Lord Morris of Borth-y-Gest) and at p.562 (per Lord Pearson).

17. [1953] P. 246.

18. Webb, 16 I.C.L.Q. 997 at p. 998.

19. Indyka v. Indyka [1967] 3 W.L.R. 510 at p. 525 (per Lord Reid); pp. 544 & 545 (per Lord Pearce); pp.556-557 (per Lord Wilberforce); p.563 (per Lord Pearson).

of domicile and those operating the principle of nationality for the assumption of divorce jurisdiction. Greatly assisted by the Report of the English Royal Commission on Marriage and Divorce, the House held that nationality of both parties[20] or that of the wife alone,

> "if the law of the [foreign] country concerned enables a wife living apart from her husband, to retain or acquire a separate qualification of nationality", 21

should be an additional basis of recognition of foreign divorces. On this point, their Lordships "in a truly neo-internationalistic way" lifted the heavy hand of Le Mesurier v. Le Mesurier[22] that the English courts should discountenance nationality as a criterion for recognising foreign divorce decrees. In abrogating the exclusiveness of domicile for this purpose, Lord Pearce noted that "even at the time of Le Mesurier, nationality could not properly be ignored". Lord Pearson, however, warned that just as an alleged domicile might be fictitious, so

> "nationality might perhaps in some circumstances be regarded as insufficient to found jurisdiction, if there was no longer any real and substantial connection between the petitioner and the country of his or her nationality". 23

In the third place, their Lordships also were in agreement that the principle in Armitage v. Attorney-General[24] should

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20. Ibid. at p.527 (per Lord Reid); pp.537 and 545 (per Lord Pearce); pp.551 and 557 (per Lord Wilberforce); pp.563 and 565 (per Lord Pearson).

21. Ibid. at p. 563.

22. [1895] A.C. 517.

23. Indyka v. Indyka [1967] 3 W.L.R. 510 at p.564.

24. [1906] P. 135.

continue to be upheld in supplementing the jurisdiction of the court of domicile for purposes of recognition of foreign decrees. In view of some of their Lordships, this principle should also be extended to nationality with the result that a decree recognised by the court of nationality of both parties should also be regarded as valid in England even if granted by a non-national court. Indeed, Lord Pearce[25] went further than this in advocating that the rule in Armitage's case should be adopted for validation of foreign divorces to the extent suggested by the Royal Commission on Marriage and Divorce. The view of the Commission, which was quoted extensively by his Lordship, was that a foreign decree should be recognised if it has been obtained judicially or otherwise by a spouse in a country of which either the husband or the wife, or both spouses, were nationals at the commencement of the proceedings. Furthermore, that such decree should also be regarded as valid in England, though not granted by the court of nationality, if it would be recognised by the law of the country of nationality of both spouses or of one of them.[26] Although this recommendation was fully endorsed by Lord Pearce, it must be pointed out that his judgment on this point could not be more than an obiter dictum since it was wholly irrelevant to the decision in Indyka's case.

Fourthly, Lord Reid, influenced by the Scottish practice on divorce jurisdiction, was in favour of accepting the concept of "matrimonial home" or "matrimonial domicile" as a proper basis of divorce jurisdiction by foreign courts entitling divorce decrees of such courts to be recognised in England.[27] The

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25. Indyka v. Indyka [1967] 3 W.L.R. 510 at pp.545-546.

26. Cmd. 9678 of 1955 at para. 857.

27. [1967] 3 W.L.R. 510 at pp. 526-527.

concept of matrimonial home or matrimonial domicile as used by his Lordship in this connection would seem to be different from the country in which both spouses had a common domicile at the commencement of the suit and is rather more extensive than the Scottish concept. In Scotland, the courts have long been exercising divorce jurisdiction in favour of the wife on the basis that the last matrimonial domicile of the spouses was in Scotland. In other words, if both parties were domiciled in Scotland and the husband deserted or abandoned the wife in that country to acquire a separate domicile abroad, the courts in Scotland will entertain any divorce proceedings instituted by the wife provided she remains resident in Scotland at the commencement of the proceedings, on the ground that the matrimonial home or domicile in which the parties last lived together was in Scotland.[28] This is a Scottish common law concept which does not derive its authority from legislative action as in England.

Undoubtedly, a divorce decree granted by the Scottish, or for that matter any other foreign, court under the concept of matrimonial home as described above will be accorded recognition in England by virtue of the doctrine of Travers v. Holley,[29] which as indicated above was approved by a majority decision of the House of Lords in Indyka v. Indyka. But this doctrine was severely criticised by Lord Reid as incapable of leading to a rational development of the law, especially with regard to

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28. Jack v. Jack (1862) 24 Sess.Cas.467; Mason v. Mason (1877) 14, S.L.R. 592; Pabst v. Pabst (1896) 6 S.L.T. 117; Lack v. Lack (1926) S.L.T. 656; Cf. Anton, op.cit., pp.317-318, and see also Report of the Royal Commission on Marriage and Divorce, 1955, Cmd. 9678, para.784.

29. [1953] P. 246.

recognition of a foreign decree granted under a jurisdictional rule analogous to the three years' residence basis of the English Courts' jurisdiction.[30] Instead, he was of the view that a better test for recognising foreign divorces based on residence is to revive

> "the old conception of the matrimonial home and hold that if the court where that home is grants decree of divorce we should recognise that decree".

In illustrating what he meant by the conception of matrimonial home, Lord Reid instanced the case of an English man who goes with his wife to a foreign country intending "to remain there for his working life" but without an intention to reside there permanently. He pointed out that according to the present law, such person would not be domiciled in that country. But in his view, it will be wrong not to recognise a decree granted to the spouses by the court of such country irrespective of the fact that they had not, at common law, acquired a domicile of choice there. Recognition, he said, should not depend on whether or not the husband intends to reside permanently there, but on the fact of his having his matrimonial home, or as appropriately termed by Professor Graveson, his "centre of domestic gravity"[31] there. Lord Reid envisages no difficulty in determining where spouse have their matrimonial home, or the community with which they have a substantial connection in this sense, except as regards persons who are confirmed normads for whom domicile should continue to be the test. He then went on to say that

> "In this matter I can see no good reason for making any distinction between the husband and the wife. If we recognise a decree granted to the one we ought

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30. [1967] 3 W.L.R. 510 at p. 527.

31. Graveson, op.cit. (6th ed.) p. 324.

> equally to recognise a decree granted to the other. But if the husband left the matrimonial home and the wife remains within the same jurisdiction, I think we should recognise a decree granted to her by the court of that jurisdiction." 32

Lord Reid's judgment that a decree granted to the husband by the court of matrimonial domicile of the parties should be recognised in England is self-evidently obiter since the facts of Indyka's case only concerned recognition of a divorce granted to the wife. But a similar guidance for future development was contained in the obiter dictum of Lord Wilberforce. He said

> "Recognition might be given to decrees given on a residence basis, either generally,[33] or in the particular case of wives living apart from their husbands where to subject them uniquely to the law of their husband's domicile would cause injustice, and where jurisdiction of the court of residence is appropriate ... As regards [residence basis], although it may be possible without any general change in the law by Parliament for judicial decision to allow recognition generally to decrees based on the non-domiciliary residence of the spouses,[33] to do so in the present context appears to me to go further than is justified by the considerations advanced before us ... It is my clear opinion that the particular departure from the rule, or tyrrany, of the domicile which I have mentioned ... is justified and is long overdue." 34

Therefore, according to the views of Lord Reid and Lord Wilberforce, a matrimonial home of the wedded pair should be sufficient as one of the tests for recognising foreign divorce decrees. Indeed, as will be presently shown, this test has already been accepted by an English High Court Judge.

Finally, Lord Reid would permit the recognition of a decree granted to a wife who, though not abandoned by her husband, goes alone to reside in a foreign country only if

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32. Indyka v. Indyka [1967] 3 W.L.R. 510, at p. 527.

33. Emphasis supplied.

34. Indyka v. Indyka [1967] 3 W.L.R. 510 at pp. 557-558.

"such a wife is habitually resident within that jurisdiction and have no present intention of leaving it."[35] Whereas the other members of the House e.g. Lord Pearce[36] and Lord Wilberforce[37] considered mere residence as a test of recognition of a foreign divorce in the interest of the wife in so far as such residence is reinforced by the nationality of the petitioner so as to provide a real and substantial connection between the petitioner and the court of the country which granted the decree.

In view of these extensive range of circumstances under which foreign decrees may now be recognised in England, their Lordships were quick to enumerate certain limitations which should prevent recognition of foreign divorce decrees. These are (i) when recognition of a foreign divorce will be contrary to public policy of the English law[38] or (ii) when the decree is vitiated by fraud or contrary to natural justice[39] or (iii) where the petitioner has gone abroad to obtain a divorce in evasion of English law.[40] How the last limitation contained in the obiter dicta of some of the members of the House should be worked out must await further interpretation of the lower courts in view of the wide range of permutations possible in the tests of recognition enunciated or suggested by individual members of the House.

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35. Indyka v. Indyka [1967] 3 W.L.R. 510 at p. 527.

36. Ibid. at p. 546.

37. Ibid. at p. 558.

38. Indyka v. Indyka [1967] 3 W.L.R. 510 at p. 544 (per Lord Pearce); p. 549 (per Lord Wilberforce).

39. Ibid. at p. 563 (per Lord Pearson); at p. 531 (per Lord Morris of Borth-y-Gest), approving of the decision in Lepre v. Lepre [1965] P. 52; See also Gray v. Formosa [1963] P.259.

40. Indyka v. Indyka [1967] 3 W.L.R. 510 at p. 544 (per Lord Pearce); p. 549 (per Lord Wilberforce); Peters v. Peters [1967] 3 All E.R. 318.

Although there is unanimity by all members of the House in their decision that the Czech decree granted to the wife should be recognised, unhappily all their L$_o$rdships spoke with different voices as to the exact nature of the new recognition rules which they all agreed are necessary to reduce limping marriages. The different criteria adopted or suggested by each of them for determining the validity of foreign divorce make it rather difficult to formulate a general principle underlying the decision besides stating the individual tests of recognition as we have done above.

It is rather surprising therefore that judicial interpretation of the ratio decidendi in Indyka v. Indyka[41] has proceeded almost unanimously on the basis that the general principle established by the House of Lords in that case is that

> A divorce granted by a foreign court will be recognised in England if there is a real and substantial connection between the petitioner and the court of the country where the decree was granted. [42]

But this formulation of the general principle seems faulty, if a general principle is ever needed in this sort of situation, since it excludes the rule in Armitage v. Attorney-General[43] which their Lordships agreed[44] should be maintained in supplementing the jurisdiction of the court of domicile or that of the court of nationality as the case may be. Lord Pearce spoke of this rule as a "sound and valuable one". If it is recognised

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41. [1967] 3 W.L.R. 510.

42. E.g. Angelo v. Angelo [1967] 3 All E.R. 314; Peters v. Peters [1967] 3 All E.R. 318; Brown v. Brown [1968] 2 W.L.R. 969. This view might have been influenced by comments on Indyka's case made by William Latey, Q.C. in 16 I.C.L.Q. (1967) 982 at p. 995. Cf. Webb, ibid. 997 at p. 1015.

43. [1906] P. 135.

44. Except Lord Reid who was silent on this point.

that the philosophy underlying the decision in Indyka's case is that the House has now finally come to terms with the idea that just as a wife living apart, under English law, had ceased since 1937 from being amenable in matters of divorce to the law of the husband's domicile; so also has the concept of unitary personal law failed in the field of recognition of foreign divorce decrees. Hence the evolution of the conception of substantial connection should be interpreted as an acknowledgment of the fact that many countries both in the common law and civil law countries have conferred on a wife living separate and apart from her husband the right to choose a different legal district to the law of which place she is amenable for the dissolution of her marriage. In other words, shorn of all forms of spurious intellectualism, the admission of the right of the court of the country with which the wife has substantial connection, whether determined by her ordinary or habitual residence, or her nationality, in that country, to dissolve the marriage in certain circumstances by applying the lex fori and not the lex domicilii of the husband, does presuppose that the law of such country, independent of the lex domicilii, determines the validity of the divorce in such circumstances. If the decision of the House in Indyka's case is viewed not solely from strict jurisdictional approach but also from the view-point of the applicable law, then it will be realised that the general principle in that case should perhaps be formulated in the following terms:

> A foreign divorce decree granted to either spouse by a foreign court will be recognised in England if it is granted, or recognised as valid, by the law of the country with which he or she has a real and most substantial connection.

This statement of the general rule will therefore comprehend such case as Mountbatten v. Mountbatten[45] and also provide a rational explanation for the recent decision of Payne, J., in Mather v. Mahoney[46] which, according to the judge, derives its authority from Indyka v. Indyka.

In Mountbatten's case, an American wife, who was resident in New York for more than three years, obtained a divorce decree in the State of Chihuahua in Mexico on the ground of incompatibility of temperament. The wife was in fact present within the jurisdiction of the Mexican court for about 24 hours. The husband who was domiciled in England submitted through a Mexican Attorney to the jurisdiction of the Mexican court. The husband later petitioned in England for a declaration that the Mexican decree had validly dissolved the marriage between him and his wife. For the husband it was submitted that since a divorce decree which has been granted by the court of a country which was not the domicile of the parties will be recognised in England if it would be regarded as valid by the court of domicile of the parties at the time of the suit (the Armitage v. Attorney-General rule); this two pronged rule should be applied to the present case so that in so far as the Mexican decree would be recognised in New York, where the wife was ordinarily resident for more than three years and whose court would have had jurisdiction under the Travers v. Holley doctrine, such decree should also be recognised in England.

Davies, J., not only rejected this submission but also

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45. [1959] P. 43.

46. [1968] 3 All E.R. 223.

declined the further argument on behalf of the husband that it would be contrary to public policy to regard spouses who were already considered as divorced in New York as still married in England and a re-marriage by either party in England as bigamous. In the course of his judgment on this point, Davies, J., observed that the principle underlying the decision in Travers v. Holley was that the English courts should recognise as valid a foreign divorce decree which has been granted to a wife by a court other than that of domicile only when the jurisdiction of the foreign court is exercised under situations "strictly analogous" to that being exercised by the courts in England. Yet it was in furtherance of this same public policy of preventing limping marriages that prompted the majority of the House (and the Court of Appeal) in Indyka's case in holding that recognition rules should not be a "mirror image" of the domestic law on divorce jurisdiction nor should "the pace of recognition be geared to the haphazard movement" of the English legislative process on jurisdiction.

Of course, the main reason advanced for justifying the decision in Mountbatten's case and which probably influenced Lord Pearce in Indyka v. Indyka[47] in supporting the decision of Davies, J., in that case, is that England was the domicile of the parties. It is however ironical that the same Lord Pearce, who was the more vocal out of the two members of the House in Indyka's case to support nationality to the extent recommended by the Royal Commission as the test of recognition of foreign divorces, should alone agree with the decision of Davies, J.,

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47. [1967] 3 W.L.R. 510 at p. 545.

in Mountbatten v. Mountbatten. It will be recalled that the Commission recommended that a decree granted by the court of nationality of either party or which would be regarded as valid by the court of nationality of either party should be recognised in England.

In the Mountbatten's case, while Lord Milford Haven, the husband, was a British national, domiciled in England, Mrs. Mountbatten was

> "an American by birth [who] had to all intents and purposes always been resident in the New York State". 48

Therefore she was a citizen of the United States and of the State of New York.[49] As was found in the case, the State of New York, the country of nationality of the wife, where she was ordinarily resident at the commencement of the suit, would recognise the Mexican decree. Therefore the decree of the Mexican court would be recognisable in England under the test of nationality advocated by Lord Pearce in Indyka's case. This test which was perhaps overlooked by Lord Pearce would seem to justify discountenancing his Lordship's dictum in Indyka's case in which he approved of the decision in Mountbatten v. Mountbatten.

The uncertainty in this area of the law did not, however, prevent Payne, J., in Mather v. Mahoney[50] from linking the rule in Armitage v. Attorney-General[51] with that of Travers v. Holley[52]

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48. As reported by Margaret Puxon, "Mexican Mix-Up" in 103 S.J. (1959) p. 246.

49. According to the Fourteenth Amendment to the United States Constitution which provides that "all persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

50. [1968] 3 All E.R. 223.

51. [1906] P. 135.

52. [1953] P. 246.

so as to recognise a decree which was not granted by the court of the country where the wife was substantially connected but which was granted in analogous situation as in Mountbatten v. Mountbatten. The American wife of a husband domiciled in England, but living in Italy, deserted him in Italy and returned to Pennsylvania where she had "spent most of her life". After less than a year's residence in Pennsylvania following her desertion, she went to the State of Nevada (another American State) in the words of Payne, J., "for purpose of obtaining her divorce". She based her petition on the ground of mental cruelty, a complaint which was served on the husband in Italy. The husband entered an appearance by instructing a Nevada Attorney to act on his behalf in the proceedings. Under these circumstances, the wife obtained a Nevada decree dissolving her marriage. Later on the husband sought a declaration in England that the Nevada decree should be recognised.

Payne, J., had no difficulty in arriving at the conclusion that at the commencement of the proceedings, the wife was an American national who was habitually resident in Pennsylvania. He, therefore, held that she had the same connection with Pennsylvania as that which was established between the petitioner and Czechoslovakia in the Indyka's case, and that since the Nevada decree would be recognised in Pennsylvania, it should also be recognised in England. In arriving at his decision, Payne, J., did not consider the effect of Mountbatten v. Mountbatten. But there is no doubt that he must have been aware of that case since there was a reference to it in the Indyka's case which the judge relied on as authority for his decision. He seemed to have assumed that the Mountbatten's case had lost its effect in view of the two-pronged nationality rule enunciated by Lord Pearce in

the Indyka's case. Mather v. Mahoney therefore supports the suggestion made above that the general principle established in Indyka v. Indyka is that a foreign decree granted or recognised by the court of the country with which the petitioner has a real and substantial connection will be recognised in England. It also shows that if Mountbatten v. Mountbatten were to be decided today, the result would be in favour of recognising the Mexican decree.

Apart from the case of Mather v. Mahoney, the process of giving meaning to the conception of substantial connection established in Indyka v. Indyka has already commenced. In Angelo v. Angelo,[53] the question was whether a German decree granted to the wife should be recognised. The marriage dissolved was celebrated in Germany in 1960 between a British subject, domiciled in England, and a girl of German nationality, domiciled, before the marriage, in Germany. The spouses lived together for a short time in England and then in France. In December, 1962 the wife left the husband in France and returned to Germany. There in April of 1963 she obtained a divorce from the court of Ravensburg. In considering a petition by the husband praying for a declaration that the German divorce decree had effectively terminated his marriage, Ormrod, J., observed that the law as to recognition of foreign decrees underwent an abrupt change in Indyka v. Indyka. He held that the wife had a real and substantial connection with Germany by virtue of her having her nationality and residence there at the commencement of the divorce proceedings and that the German decree should be recognised in England.

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53. [1967] 3 All E.R. 314.

In Peters v. Peters,[54] the husband and wife, both nationals of Yugoslavia, were domiciled in that country at the time of their marriage in 1947. They left Yugoslavia and came to England where they acquired a domicile of choice and also obtained British nationality. They later separated and towards the end of 1962, the husband who was anxious to marry another woman, requested his enstranged wife to go to Yugoslavia for a divorce. A decree was granted to the wife after ten days residence in that country on the jurisdictional base that the marriage was celebrated in Yugoslavia. Immediately afterwards, she returned to England with her decree. The husband, in reliance on the Yugoslavian decree sought a declaration in England that his marriage had been validly dissolved. Wrangham, J., stated that the high water mark of the House of Lords decision in Indyka v. Indyka and the interpretation of its ratio decidendi made in Angelo v. Angelo was that a foreign divorce decree will be recognised in England

> "whenever there is a real and substantial connection between the petitioner and the court exercising jurisdiction".

This connection he found to be lacking in the present case since the mere celebration of a marriage in a particular country where the divorce was obtained does not fall within any of the tests established in Indyka's case for determining the substantial connection of a petitioner with the legal system of a country competent to pronounce the dissolution of the marriage. He also further held that the fact that the spouses were at the time of their marriage nationals and domiciliaries of Yugoslavia will not alter the position since they have long abandoned their nationality and domicile in that country before the commencement

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54. [1967] 3 All E.R. 318.

of the divorce proceedings there.

The case of Tijanic v. Tijanic[55] was also concerned with recognition in England of a divorce decree granted by a Yugoslavian court. The husband and wife married in 1934 in Yugoslavia at a time when both parties were nationals of, and also domiciled in, Yugoslavia. Later the husband acquired a domicile of choice in England and obtained British nationality. Despite repeated requests by the husband, the wife refused to join him in England. Consequently he initiated in 1960 divorce proceedings in Yugoslavia through a proxy who was assisted by the husband's solicitor. The Yugoslavian court assumed jurisdiction under the provision of a Yugoslavian law whereby a marriage could be dissolved if the spouses had been living apart for a long time and both consent to divorce. The wife joined the husband in applying for a divorce under this provision and a decree was accordingly granted to them in 1961. On the husband's petition in England that the Yugoslavian decree should be recognised, Sir Jocelyn Simon P, referring to the House of Lords Decision in Indyka v. Indyka, pointed out that there might be other grounds upon which the decree could have been recognised. He was, however, content with basing his decision on the ground that in so far as the wife joined the husband in obtaining the decree, the decree was granted to a wife who had been resident for the whole of her life in Yugoslavia; that English courts assume jurisdiction on similar basis and that the rule in Travers v. Holley, which was approved in Indyka v. Indyka compels recognition being given to the Yugoslavian decree.

Independent of the fact that the wife joined the husband

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55. [1967] 3 W.L.R. 1566.

in obtaining the divorce decree, one of the grounds on which Sir Jocelyn Simon P. could have recognised the decree is that it was granted to the husband by the court of nationality of the wife, a test proposed by the Royal Commission on Marriage and Divorce and which was endorsed by Lord Pearce in the Indyka's case. The judge left this point open and it remains to be seen whether a decree granted to the husband alone by the court of the country of which the wife is a national is ipso facto entitled to recognition in England.

Also in Brown v. Brown[56] the rule in Robinson-Scott v. Robinson-Scott[57] was combined with that of substantial connection to recognise a divorce decree granted by a Swedish Court to a wife whose nationality was Swedish and who had resided in Sweden for at least three years before the commencement of the proceedings.

Finally, in Blair v. Blair,[58] the suggestion made by Lords Reid and Wilberforce that the concept of matrimonial home might in appropriate cases be accepted as constituting a proper jurisdiction for purposes of recognising a decree granted by the court of such place was translated into a rule of law by Cumming-Bruce, J. In that case, a husband whose domicile of origin was English married a Norwegian woman in 1957 and settled with the wife in Norway, thereby acquiring a domicile of choice in that country. Two and a half years later, the husband went to England on a training course. The wife subse-

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56. [1968] 2 W.L.R. 969.

57. [1958] P. 71.

58. [1968] 3 All E.R. 639.

quently joined him but soon became unhappy after a short stay in the country. He therefore sent her back to Norway intending to meet her there on completion of his training. Once back in Norway, the wife committed adultery and became pregnant. She later confessed her adultery and asked the husband to divorce her. The letter communicating the wife's adultery to the husband was received by him in England in July, 1963 and on receipt of the letter, he abandoned his intention of going back to Norway thereby losing his domicile of choice in that country and reverting to his former domicile in England. Nonetheless, he acceded to the wife's request and instructed a Norwegian Lawyer to start divorce proceedings in Norway. A suit was commenced on August 31, 1963. The Norwegian court assumed jurisdiction on the basis that the wife was born and settled in Norway and that Norway was at all times intended to be the matrimonial home of the spouses. And a divorce decree was granted to the husband in September 1963 on the ground of the adultery by the wife.

In considering whether the Norwegian decree should be recognised in England, Cumming Bruce, J., found that the husband, albeit unawares, lost his domicile of choice in Norway in July 1963 before the divorce proceedings were commenced. He pointed out that on the authority of Le Mesurier v. Le Mesurier[59] he should have been duty bound to consider the Norwegian decree invalid, but he was satisfied that the tests of recognition are no longer inflexible in view of the House of Lords decision in Indyka v. Indyka. He went on to say that the speeches of their

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59. (1895) A.C. 517.

Lordships in that case were immediately concerned with recognition of a decree granted to a wife by the court of the country with which she had a real and substantial connection. Nonetheless, he was of the view that the decision in the case went further than that and continued by saying:

> "While affirming that domicile, the main foundation of English Jurisdiction, must continue to be regarded as the primary foundation of recognition in England of foreign decrees, their lordships have decided that, in so far as Le Mesurier v. Le Mesurier laid down that domicile was the sole test of recognition it should not be followed if other tests are applicable. Their lordships indicated that they left to the courts the further elucidation and application of these tests, emphasising the importance of controlling or suppressing any attempt at abuse. In my view, it is now open to an English court of first instance to consider all the facts appertaining to the grant of a decree by a foreign court, whether to a husband or to a wife, and to determine whether in spite of the fact that there was no domicile of a petitioner husband at the date of the institution of proceedings, the decree should be recognised." 60

One of the "other tests" proposed in Indyka's case, as we have indicated above, was the doctrine of "matrimonial home" or "non-domiciliary residence" which both Lord Reid and Lord Wilberforce suggested could be used as additional test of recognition of foreign decrees granted to either spouse. In upholding the validity of the Norwegian decree, Cumming Bruce, J., quoted in support the dictum of Lord Wilberforce on this point and held that since the decree was granted to the husband by the court of the matrimonial home of the parties, it should be recognised. In his view, the fact that the husband had just abandoned his domicile of choice in Norway before the commencement of the suit should not be regarded as fatal, more so when it was clear that the very event which terminated his domicile

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60. [1968] 3 All E.R. 639 at p. 643.

in Norway, i.e. adultery by the wife, was the cause of the proceedings there.

An interesting problem raised by the decision of Cumming Bruce, J., in this case is whether a divorce decree granted to a husband in such circumstances as occurred in Levett v. Levett[61] should now be recognised in England on the authority of Indyka v. Indyka. This question is still not free from doubt in that Blair v. Blair though having some similarities with Levett v. Levett differs in one significant respect from that case. In Levett's case as in the Blair's case, the divorce decree was granted by the court of nationality of the wife. In both cases, the wives had also resided for a time in the countries of their nationalities before the dissolution of the marriage. These two factors i.e. nationality and residence, would presumably constitute a similar connection between Mrs. Levett and Germany (even though she was resident in Germany for about a month before the commencement of the proceedings) as that between Mrs Blair and Norway. Also in both cases, the decrees were granted to the husbands both of whom were domiciled in England at the commencement of the proceedings. But in Blair's case, the husband had in addition established a matrimonial home in Norway, where until shortly before the time of the suit, he was also domiciled; whereas in Levett's case there was no such connection between the husband and Germany. But it is also significant that in Blair's case, it was the husband who instituted divorce proceedings in Norway, albeit at the request of the wife, whereas the husband in Levett's case was merely concerned with defending the wife's petition and only cross-petitioned the

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61. [1957] P. 156.

German court for divorce on the ground of the wife's adultery when she refused to proceed with her own action.

In our view, it would seem that the difference between Blair v. Blair and Levett v. Levett is rather insignificant as to justify non-recognition of a divorce granted to the husband on his cross-petition in a country with which his wife has a real and substantial connection. In any event, if the rule of recognition recommended by the Royal Commission that an English court should recognise a divorce obtained "by a spouse in accordance with the law of the country of which ... either the husband or the wife was a national at the time of the proceedings" and which was fully supported by the dicta of some of their Lordships in Indyka v. Indyka is accepted, a decree granted to a husband under circumstances as occurred in Levett v. Levett will now be recognised. It may be mentioned in this connection that Lord Pearce specifically adverted to the Levett's case in advocating the adoption of this rule and stated that its acceptance "would have produced a different and more satisfactory result"[62] in that case.

(d) Summary of the English Rules of Recognition and Suggestions for their modification in Nigeria

To reiterate, the general principle of recognising foreign divorces in England as extended by recent decisions is that an English court should recognise a foreign divorce if it emanates from, or it would be recognised by, the court of the country with which the petitioner had a real and substantial connection

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62. Indyka v. Indyka [1967] 3 W.L.R. 510 at p.546.

at the commencement of the divorce proceedings. If Mather v. Mahoney[63] is a good interpretation of the ratio decidendi in Indyka v. Indyka,[64] this way of stating the general principle takes care of the need for recognising a foreign divorce decree, though not granted by the court of the country with which the petitioner had a real and substantial connection, but which would be recognised by the court of the country with which the party had such connection.

Several criteria may be used to determine the country with which there had been substantial connection for this purpose. In stating these tests, two situations are clearly discernible. (a) Where the spouses are living together in the same country abroad and (b) Where, for one reason or the other, they had ceased from doing so.

In the first situation, the common domicile of the spouse is still a foundation of recognition.[65] However, of cumulative consideration with domicile for this purpose are now the common nationality[66] or the joint matrimonial home[67] of the spouses.

In the second situation, i.e. where the spouses are living apart in different countries, the archaic dogma that the wife was always dependent on the court of domicile of the husband for her matrimonial rights and remedies, dispensed with to a certain extent in the bilateral rules of recognition established in Travers v. Holley,[68] is now considered totally unnecessary. As

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63. [1968] 3 All E.R. 223.

64. [1967] 3 W.L.R. 510.

65. Le Mesurier v. Le Mesurier (1895) A.C.517; Indyka v. Indyka [1967] 3 W.L.R. 510.

66. Indyka v. Indyka [1967] 3 W.L.R. 510.

67. Ibid.; Blair v. Blair [1968] 3 All E.R. 639.

68. [1953] P. 246.

regards this situation, the court of the following countries could pronounce on the dissolution of the marriage between the spouses on a petition presented by the wife.

(i) The country of the last matrimonial domicile or matrimonial home of the spouses in which the wife continues to reside.[69]

(ii) The country of nationality of the wife which is also the place of her residence at the time of the proceedings.[70]

(iii) The country in which the wife habitually resides with no present intention of leaving even if the wife is not a national of such country.[71]

(iv) The country whose basis of jurisdiction corresponds with any of those being exercised by the English courts under section 40 (1) (a) and (b) of the Matrimonial Causes Act, 1965.[72]

According to the judicial interpretation of the Indyka's case made in Tijanic v. Tijanic,[73] it is clear that no objection would be raised to recognising a foreign decree granted to the husband by the courts of such countries as enumerated in (i) to (iv) above, provided the wife joins the husband in the divorce proceedings and the decree is granted to both spouses. It would logically follow that a decree granted to the husband as a result

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69. Indyka v. Indyka /1967/ 3 W.L.R. 510.

70. Angelo v. Angelo [1967] 3 All E.R. 314; Tijanic v. Tijanic [1967] 3 W.L.R. 1566; Brown v. Brown [1968] 2 W.L.R. 969.

71. Indyka v. Indyka [1967] 3 W.L.R. 510.

72. Travers v. Holley [1953] P. 246.

73. [1967] 3 W.L.R. 1566.

of his cross-petition in a proceeding instituted by the wife in any of such countries should also be recognised.

There could be no doubt that the House of Lords made a remarkable breakthrough in Indyka v. Indyka by establishing a wider bases of recognition of foreign decrees so as to limit the number of limping marriages and remove the disastrous effects of such pehnomenon in English private international law. It is not surprising then that their Lordships' decision in the case has evoked sympathetic reception from all quarters. On the other hand, it must be admitted that a full crystalization of some of the rules established or proposed for recognition of foreign decrees by their Lordships still awaits such refinement as the lower courts in England would give them, a process which, as we have seen, has already commenced. Also, few of the rules are overlapping and are uncertain in their scope of operation. For example, now that matrimonial home has been equated with domicile or nationality as a concurrent test of recognition, should a decree granted to either spouse in a country outside the matrimonial home, and with which the petitioner has no substantial connection whatsoever, not be recognised in England if it would be recognised by the court of the matrimonial home on the analogy with the rule in Armitage v. Att.-Gen. and Mather v. Mahoney? In our view, the complex nature of, and the uncertainty in, some of these rules are due to three factors in the English domestic law on divorce jurisdiction.

First, the refusal of the British Parliament, despite protestations by almost all judicial and juristic experts on this subject, to give a wife who is living separate and apart from her husband the capacity to acquire a separate domicile for

purposes of divorce and other matrimonial causes. Rather, the statutory mitigation of the principle of single domiciliary jurisdiction has proceeded on a piecemeal basis which, on the other hand, is being matched by hotchpotch rules of recognition.

Secondly, the serious disadvantages inherent in adopting an unduly rigid and formalistic means of determining where a person has his domicile.[74] After all, the notion of real and substantial connection is not a novel idea in the common law rules of private international law. The concept of domicile has always been basically associated with the country with which an individual has "the closest personal connection in matters of domestic law".

Closely linked with the second factor is the notion that domicile, for the diverse purposes for which the concept is being used, should have the same meaning. The adoption of a broader basis of definition of domicile which will make it capable of being manipulated to achieve slightly variable significations for the diverse purposes for which it is being employed, would have obviated the necessity for creating an additional connecting factor i.e. that of the "matrimonial home" or "non-domiciliary residence" - implying some degree of permanence which is a shade less than the degree of permanence required to establish a new domicile - for the purpose of recognising foreign divorce decrees. With this point in view, domicile with a less-exacting definition would have been adequate

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74. In fact these two defects of English law were acknowledged by the majority decision in Indyka v. Indyka. For example, Lord Wilberforce pointed out that later developments in English law have meant that the conception of domicile frequently does not represent the community to which people belong and that the principle that a wife could not acquire a separate domicile, when living apart, could cause great hardships to the wife in the field of matrimonial causes. This point has been fully considered in our chapter on Domicile.

to perform its historic function of determining the individual's personal law, which in principle ought to govern all matters of his domestic status including dissolution of his marriage. That the core of domicile is the same but that its location depends on the particular purpose for which the concept is being employed is the conclusion drawn in the American Law Institute's Re-statement on Conflict of Laws[75] and also a solution suggested by American legal writers.[76]

In view of these defects in the bases of English courts' jurisdiction, admirable though the effort of the House of Lords is in extending the common law rules of recognition of foreign divorces may be, the recognition rules are at best an endeavour to patch up or fill gaps in the law by pouring new wines into old bottles. Unless the domestic policy on divorce jurisdiction is radically modified, the new rules for recognition will still be fraught with the difficulty of precise analysis. And since the Nigerian High Courts are required to exercise their jurisdiction in conformity with the law and practice in England, the Nigerian law on divorce jurisdiction shares these defects of the English law.

We have already observed that in strict legal theory, only the pre-1900 common law rules are of authoritative effect in Nigeria and that any common law rule established in England after

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75. Proposed Official Draft, Part I (1967) at pp.61-62. "Domicil serves a large number of purposes, and undoubtedly, somewhat different reasons and motivations underlie its use for certain of these purposes. It may therefore be expected that the courts will on occasion be either more or less inclined to find a person domiciled in a State for one purpose (as to give him a divorce) than for another purpose ... /T/he core of domicile is everywhere the same. But in close cases, decision of question of domicile may sometimes depend upon the purpose for which the domicile concept is used in the particular case".

76. Cook, op.cit., pp.194-203; Reese, "Does Domicil Bear a Single Meaning?" 55 Colum.L.Rev. (1955) 589; Ehrenzweig, Conflict of Laws, p.240.

1900 are of persuasive effect in Nigeria. This sort of situation makes it possible for the Nigerian courts to make modifications to some of the criteria of substantial connection which were propounded by recent English decisions as bases of recognition of foreign divorce decrees. But it is submitted that this they will find almost impossible to do in so far as the Nigerian law on divorce jurisdiction is tied to the apron strings of the English law.

With regards to the bases of the Nigerian courts' jurisdiction, it has been suggested in the first part of this chapter that the Nigerian law should be untied from the English law and that a wife, living apart from her husband, should be capable of acquiring a separate domicile for purposes of divorce jurisdiction at home or abroad. If this proposition is accepted, the problem of recognition of a foreign decree granted to either the husband or the wife in accordance with the common lex domicilii or one of the leges domicilii of the spouses will be susceptible of easier solution.

Moreover, the acceptance of our suggested definition of domicile as the "country in which a person has the centre of his domestic, social and civil life"[77] will make it possible for the country in which the spouses have their matrimonial home, as defined by Lord Reid,[78] to be equated with the country of their domicile for purposes of recognition of divorce decrees. Besides these suggestions, it will be appropriate to welcome in Nigeria, the spirit of internationalism which motivated the House of

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77. See Chapter 2 "Conclusions".

78. Supra.

Lords in accepting nationality as one of the foundations for recognising foreign divorce decrees. This additional test will enable a divorce decree based on the nationality of one or both spouses, especially in neighbouring African civil law countries, to be recognised in Nigeria. And since it is generally accepted that a close relation exists between bases of divorce jurisdiction of the courts of a particular country and its tests for recognising foreign divorce decrees, the acceptance in Nigeria of the conception of separate domiciles for a husband and a wife who are living apart will involve the formulation of the Nigerian courts' rules of recognition as follows:

A foreign divorce obtained by a spouse shall be recognised as valid by the court of/State in Nigeria if:-

1. It has been obtained in the country in which both the parties were, or either of them was, domiciled at the commencement of the proceedings, or
2. It would be recognised by the court of the country in which both the parties were, or either of them was, domiciled at the commencement of the proceedings, or
3. It was obtained in the country of nationality and residence of one of, or both, the parties at the commencement of the proceedings, or
4. It would be recognised by the court of the country of nationality and residence of one of, or both, the parties at the commencement of the proceedings.
5. Lastly, in view of the special circumstances of the Nigerian law, it will be necessary to provide for recognition of a divorce which has been obtained by a spouse in the country in which she was resident at the

> commencement of the proceedings if there was substantial identity between the divorce law of such country and that of the State in Nigeria in which the foreign divorce is sought to be recognised.[79]

This last rule will no doubt strike anybody familiar with the common law as a novel approach. The purpose of this rule becomes clear when it is realised that the Nigerian law on matrimonial causes relating to monogamous marriages is not merely an incorporation by reference of the English law on this topic but shares the same identity with the laws of some other former British Colonial territories which, instead of enacting their own laws on divorce and other matrimonial causes, still apply, like Nigeria, the law in England for the time being in force.[79] For example, section 17 of the Ghanaian Courts Ordinance which is preserved by section 154 (3) of the Courts Act of 1960[80] provides that the High Courts in Ghana should apply the matrimonial causes law for the time being in force in England. Similarly, section 19 of the Gambian Laws of England (Application) Act[81] provides that the Supreme Court of Gambia should apply the English Matrimonial Causes law in force in England before 18th February, 1965. The effect of these enactments is that in so far as these countries viz. Nigeria, Ghana, Gambia and England, are concerned, dissolution of a monogamous marriage is governed by the same law, i.e. the English law.[82] This type of situation raises what is

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79. For the present position of the law on the recognition of foreign divorce decrees, see the postscript.

80. (C.A.9) of 1960.

81. Cap. 104, Laws of Gambia (1960 ed.).

82. The fact that the application of the English matrimonial causes law in Gambia is limited to the law in force in England before 18/2/65 does not detract from this statement since the English Matrimonial Causes Act, 1965 which came into force on 8/11/65 is mostly a consolidation of previous enactments.

known in private international law as "false conflicts" in that although there may be conflict of jurisdiction of the courts, there certainly is identity in the laws being applied. To demand, therefore, the domicile or nationality of the parties in any of these countries as a test of recognition of its divorce decrees will be nothing but an illogical adherence to verbal formula. Even when the desirable break is made with the English law on divorce and other matrimonial causes relating to monogamous marriages, it will still be necessary to retain the last rule, abundans cautela, for a period of time so as to permit the recognition of any divorce decrees already granted in these countries to Nigerian nationals and Nigerian State domiciliaries who might have been resident there before the change in the Nigerian law is effected.

In conclusion, it must be added that since extra-judicial divorces are permitted by most systems of law in Nigeria, there seems to be no reason why the above guidelines as to the attitude which Nigerian courts might be disposed to take should be confined to decrees granted by courts of law in foreign countries. The recognition rules should also be employed to determine the validity of divorces granted by other agencies as well as extra-judicial divorces.

CHAPTER FIVE

CREATION OF THE STATUS OF LEGITIMACY UNDER THE NIGERIAN DOMESTIC LAW.

1. INTRODUCTION

Legitimacy has been defined as "the legal kinship between a child and one or both of its parents".[1] It is a domestic status attributed by law to the natural kinship existing between a child and its parents. Though derivative from the acts of the natural parents, if the status is not conferred by law, the natural relationship existing between the child and its parents is an illegitimate one. As has been pointed out by Kuhn, [2] legitimacy is a legal and not a natural concept, for nature known no legitimate children; it is only concerned with children.

The status of a person as the legitimate child of his parents may arise from one out of a number of factors. The most universal in all the legal systems of the world is birth in lawful wedlock. Indeed, this was the only method acceptable to the common law. But the harsh common law rule that all children that were not begotten by parties to valid marriage were bastardised and remained indelible bastards for life was not found in the Roman law. Under that system of law, there were certain prescribed conditions upon which a child otherwise illegitimate according to the lawful wedlock theory could subsequently be admitted to the status of legitimacy, thereby placing it in a position which he would have occupied had it been born legitimate. These methods of "legitimation" strictly so-called, were (a) Subsequent marriage of the child's natural parents; (b) Special dispensation by the Emperor; (c) Acknowledg-

1. Kuhn, Comparative Commentaries on Private International Law (1937) p.198; See also, The Restatement Second, Tentative Draft No.4, Para.137, Comment a.
2. op.cit., p.198.

ment or recognition of paternity by the putative father (d) Designation by the last will of the putative father; and (e) Adoption.[3] In the Roman law, all these five modes of conferring the status of legitimacy on an otherwise illegitimate child put the child upon the same footing as if he had been born in lawful wedlock.

All these prerequsites of attaining full legitimate status have been preserved by some civil law countries where institutions of the Roman law are more predominant.[4] But with regard to the principle of paternal acknowledgment in the European civil law systems, the effect varies from country to country. Though accepted in Austria, Belgium Denmark, France, Germany, Greece, Hungary, Italy, Luxembourg, Monaco, Netherlands, Norway, Poland, Rumania, Spain, Sweden, Switzerland and Yugoslavia, [5] only in few of these countries, e.g. Norway, [6] Denmark,[7] and Switzerland[8] does paternal acknowledgment effect a complete transmutation of status from that of illegitimacy to one of legitimacy with full equalization with children born in lawful wedlock. In most others, acknowledgment of paternity by the

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3. See H.F. Jolowicz, Roman Foundation of Modern Law (1957) pp.194-201.
4. See I. Rabel, op.cit., p.629 et seq.; R.D. Killewijn, 4 I.L.Q. 307 at p.314 as regards paternal acknowledgment.
5. For a detailed and comparative study of the laws of the countries enumerated see Lasok, 10 I.C.L.Q. (1961) 123 at p.127 et seq., 17, I.C.L.Q. (1968) 634; Stone, 15 I.C.L.Q. (1966) 505 at pp. 517-525.
6. Para.1 of Law No. 10 of Dec. 21, 1926.
7. Inheritance Act, No.215 of May 31, 1963 which came into effect on 1.4.1964.
8. Art. 461 (2) of the Civil Code.

putative father only creates a priviledge category of illegitimacy, i.e. a hybrid status of partial legitimacy, in the sense that an acknowledged childhas limited rights and cannot compete on equal terms with a child born in lawful wedlock.

In the common law countries, the concept of legitimatio per subsequens matrimonium has been accepted almost universally ande has, in the quaint aphorism of a Californian judge,[9] become "manna to the bastards of the world";[10] while paternal cknowledgment is a mode of determining the legitimate status of a person in about twenty jurisdictions of the United States of America. The last mode of attaining legitimate status is also found in some legal systems in Asia[11] and in Africa,[12] although it is uncertain whether legitimation by acknowledgment in African and Asiatic jurisprudence has any connection with the Roman law as in the European and American systems.

In the Nigerian law, there are three methods by which the offspring of two persons may acquire legitimate status. As has been aptly stated by Ademola C.J.F, in the Federal Supreme Court case of Lawal v. Younan: [13]

9. in Blythe v. Ayres (1892) 96 Cal. 532, at p.563.
10. For a comparative survey of the common law system operating this concept, see White, 36 L.Q.R. (1920) 255. However, since 1920 many more countries have adopted the conception of legitimatio per subsequens matrimonium.
11. e.g. Turkey, See 9 International Social Science Bulletin (1957) p.31; Thailand, See D.C. Buxbaum, Family Law and Customary Law in Asia: A Contemporary Legal Perspective (1968) p. xxxii; India, See Mulla, Principles of Mohammedan Law, (1968)(16th ed. by M. Hidayatulla) 316 et seq.
12. e.g. Tanganyika, See Declaration of Local Customary Law, Govt. Notice No.279 of 1963, Rule 181B, and formerly in Congo Kinshasa before 1958; since when the father of an illegitimate child who is not married to the mother is no longer able to claim "droit de paternite". See J.M. Pauwels "Legitimation of Children In Customary Law in Kinshasa" in Gluckman, Ideas and Procedures African Customary Law (1969) at p.227 et seq.
13. (1961) 1 All N.L.R. 245 at p.250.

> "Unlike England, legitimate children in Nigeria are not confined to children born in wedlock or children legitimated by subsequent marriage of the parents. In Nigeria a child is legitimate if born in [monogamous] wedlock..... There are also legitimate children born in marriage under Native Law and Custom [i.e. polygamous marriage]. Children not born in [monogamous] wedlock or who are not the issue of a [polygamous] marriage ..... but are issues born without marriage can also be regarded as legitimate for certain purposes if paternity has been acknowledged by the putative father. .....On the face of this, it is clear that legitimacy in England is a different concept to legitimacy in Nigeria".

Two observations need be made about this concise statement of the Nigerian law on legitimacy. First, the three criteria for determining legitimacy in Nigeria are shared with most continental, some American, Asiatic and other African legal systems. Secondly, it will be noticed that the Chief Justice makes no distinction between legitimacy strictly so-called i.e. birth in lawful wedlock, and legitimation, i.e. a process whereby legitimacy is later conferred on an illegitimate child by a subsequent act of the parents. This is because the English idea of "heirship", as an incident of land or in relation to succession to heriditary peerage and title of honour, being dependent, at common law "not only that the man should be legitimate, but born within the narrowest pale of English legitimacy" is an alien conception to the Nigerian law. Thus as has been stated by Callow J. in Phillips v. Phillips, [14] there is no evidence under Nigeria law of "inheritance by the eldest son to the exclusion partially or wholly of younger children and I have no reason to believe that any such form of succession exists." [15] Therefore, since the effect in Nigeria of the above

14. (1946) 18 N.L.R. 102 at pp.103-104.

15. But contra. Obi, The Ibo Law of Property, p.153 et seq. where he states that inheritance by the eldest son to the exclusion of all younger children exists in Ibo Customary law in situations where the children of the deceased were born of the same woman.

three criteria for attaining legitimate status is the same, no useful purpose will be served by considering legitimacy strictly so-called apart from legitimation except that the term legitimacy will henceforth be used to denote the status of a person as the lawful offspring of his parents while legitimation will be employed with reference to the process of attaining that status by all other means apart from birth in lawful marriage.

It cannot be gainsaid that the law on legitimacy plays an important role in the legal system of any particular country. In Nigeria the legitimacy of a person is relevant in determining his nationality,[16] and domicile, the right to his father's name and his entitlement to his parents' intestate estate or to take as beneficiary under the parents' insurance policy. His status as a legitimate child is also relevant in determining whether he could share in the family property or whether the word "child" or "issue" in wills or other dispositions inter vivos and in statutes includes him. Moreover, the interest of his parents, especially the father, may be dependent on his legitimacy e.g. right of the father to inherit through him on his intestacy or whether his father owes him any obligation of support or whether he has a prior claim to his custody or guardianship.

There is no doubt that the law on legitimacy in Nigeria is still bedeviled by many of difficulties. To begin

16. See the Nigerian Citizenship Act, No.43 of 1960, s.4(1); and also the Republican Constitution, 1963, ss.7, 11, 12 and 17(2). By virtue of these provisions, a child born outside Nigeria can claim Nigerian Nationality through his father who is a citizen of Nigeria. Since an illegitimate child has no claim of rights on its father, legitimacy of a child becomes relevant in determining its nationality.

with, apart from being imprecise in places, it lacks legislative or judicial co-ordination of principles in relation to the above three modes of determining the legitimacy of a person. Also, despite the historic parting of the ways between the domestic laws of England and Nigeria - a fact which was well emphasised by the Federal Supreme Court in Lawal v. Younan[17] - the full development of the Nigerian law on legitimacy, in accordance with the deep-rooted tradition of the society, is still being hampered in practice by the harsh attitude of the common law of England towards illegitimacy. Curiously enough, it is admitted by judges and legislature alike that the social stigma attaching to illegitimate children is less accute in Nigeria than in England.[18] This admission would seem to make it illogical for the English common law to have a predominating influence on the Nigerian law.

The ensuing discussion will elucidate further on the above reflections on the Nigerian law. Suffice it to say for the moment that at least three factors seem responsible for the unsatisfactory position of the law. First, the problem with most Nigerian judges is that, having been trained almost exclusively in the English legal system and consequently more conversant with that system of law than any other, they appear already psychologically conditioned to fixing Nigerian law into the scheme of English common law without having regard to the basic political and social differences between the two countries. For example, the proposition has been accepted that an illegitimate child born to a man during the subsistence

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17. [1961] All N.L.R.245.

18. See e.g. Phillips v. Phillips (1946) 18 N.L.R. 102 at p.103 (per Callow J.); also the Nigerian Legislative Council Debates on the Legitimacy Bill, 1929, 7th Session, 1929 at p.62.

of a polygamous marriage can be legitimated by an act of acknowledgment by its putative father even if the legitimatizing act was performed during the continuance of such marriage. On the other hand, it has been decided several times that a person who is married under monogamy has no capacity to legitimate an illegitimate child born to him during the subsistence of such marriage by paternal acknowledgment, whether during the continuance of the monogamous marriage or after its termination. In short, just as the common law of England elevates monogamous marriages over a polygamous one, so also are the judges of the "English-type" courts in Nigeria prepared to accord pride of place to birth in monogamous marriage over all other prerequisites for determining the legitimacy of a person in Nigeria on the viewpoint that the public policy of the common law against promiscuous relationships demands such a solution.[19] (We shall have cause to show later that even the English law has now adopted a solution which disregards the circumstances of a child's birth in determining what the attitude of the law should be towards it.)

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19. Messrs. Kasunmu and Salacuse, op.cit., p.227, sum up the attitude of the Nigerian judges to legitimation by paternal acknowledgment as follows:

> "Some Nigerian judges trained in the English law find it difficult if not impossible to appreciate the fact that a person can have a legitimate child without going through a marriage. This has led to their reluctance to accept the concept of acknowledgment under customary law in toto".

In our view, the unsatisfactory position of the law on legitimacy in Nigeria is due, not to the judges' reluctance to accept the proposition that marriage is not an indispensable prerequisite to legitimacy, but to their lack of appreciation of the fact that paternal acknowledgment should be an equal mode of determining the legitimacy of a person as birth in lawful marriage, whether such marriage is momogamous or polygamous.

Secondly, the law in the books is often inaccurately stated, perhaps as a result of inadequate research or legal analysis. For instance, despite the statement of the law in Lawal v. Younan [20] and in statutory provisions,[21] Dr. Lloyd was still able to assert, rather inaccurately, that "The legitimacy of the children depends on their recognition by the father; the status of the mother - as wife by English or customary law, or as a lover - is immaterial".[22] In addition, the same author was able to write that before legitimation by paternal acknowledgment can be validly effected, a bilateral recognition by both the father and the illegitimate child is necessary. When it is remembered that Dr. Lloyd was writing exclusively on the Yoruba law of Western Nigeria, this assertion appears to us equally untrue. As would be discovered below, only a unilateral act of recognition by the putative father is required to legitimate his otherwise illegitimate child in this jurisdiction. Of course, Dr. Lloyd may be forgiven for failure to make what would seem to appear to a social anthropologist as minor, if not unneeessary, refinements; this cannot however be said of legal writers [23] who are of the erroneous view that legitimation by acknowledgment or recognition is confined to few jurisdictions in Nigeria and that it is not a concept of Moslem law operating in most of the Northern Nigerian States.

Thirdly, absence of comparative study in legal literature has meant that the Nigerian judges have no opportunity to know what they do in other countries besides England and thereby

20. [1961] All N.L.R.245.

21. e.g. s. 147 of the Evidence Act, Cap.62, Laws of the Federation of Nigeria, (1958) ed.).

22. P.C. Lloyd, Yoruba Land Law, p.297.

23. e.g. Kásunmu and Salacuse, op.cit. pp.207 and 227; E.I. Nwogugu, 8 J.A.L. (1964) p.95 and Obi, Modern Family Law in Southern Nigeria, p.311.

discover that there is nothing unusual about the apparent idiosyncracy of the Nigerian law in tracing legitimacy of a person through an act of acknowledgment by his putative father, in addition to other usual modes of determining legitimacy.

The complex nature of the law on legitimacy, especially in view of the co-existence of monogamy and polygamy, coupled with the chaotic situation of the rules designed for determining legitimacy under some of the above three criteria, will necessitate an exhaustive analysis of the domestic law than is usually required in a study solely concerned with conflicutal situations. For if the domestic law is not based on a sound foundation, the formulation of its conflicts rules would be a difficult exercise. Also, since it is our considered opinion that the Nigerian law on legitimacy is likely to need a great deal of information about foreign legal systems so that judges may appreciate the danger of considering this part of the law in isolation, our discussion even about the Nigerian municipal law will be heavily linked with a comparison of the conception of legitimacy in some other countries as a background to reform proposals. After all, comparative law, says Vinogradoff [24] is a useful exercise in that comparison of existing systems of law makes it possible to trace analogies and contrasts in the treatment of practical problems, and offers many expedients and possible solutions. Therefore, it is proposed to use comparative law in this Chapter to stimulate the imagination with regard to the domestic law, while the next Chapter will be devoted to a consideration of the rules of private international law for determining the legitimacy of a person.

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24. Encyclopedia Britannica (11th ed.); Jurisprudence, Comparative.

2. THE LAWFUL WEDLOCK THEORY AND PRESUMPTIONS OF LEGITIMACY.

(a) Monogamous Marriages.

Until the passing of the Evidence Act, 1943 which came into effect on 1st June, 1945, the common law rule that birth in lawful wedlock determines legitimacy was operative in Nigeria. This rule has given rise to two presumptions:

(i) Birth in lawful wedlock is presumed if the child was actually or possibly born of the mother's husband during the continuance of the marriage.

(ii) Where a child was born within a reasonable period after the dissolution of the marriage by death or divorce, the child so born is deemed to be the legitimate child of the mother's late or former husband.

The first presumption derives its source from the unanimous opinion of the judges of the Common Please in Banbury Peerage Case.[25] There, it was stated, in reply to questions addressed to the judges by the House of Lords, that "the fact of the birth of a child from a woman united to a man by lawful wedlock is, generally, by the law of England, prima facie evidence that the child is legitimate". For the purpose of this presumption, it is immaterial whether the child was conceived before or after the celebration of a marriage between its parents. The crucial time for its operation is that of the birth of the child and not the time of conception. Thus, as stated by Lord Cairns in Gardner v. Gardner,[26] "

> "the marriage to a woman avowedly pregnant, and near the time of delivery, by a man who has been courting her and keeping company with her would raise ... a presumption of fact so strong that the man was the father of the child, that it would be extremely difficult to rebut or controvert it".

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25. (1811) 1 Sim. & St. 153 at 155.
26. (1877) 2 App. Cas. 723 at 728.

There appears to be no judicial authority in England for the second presumption until the decision in Re Leman's Trusts [27] besides the statement of Sir Edward Coke in his Commentaries on Littleton. [28] It was, however, clearly established long before the enactment of the Nigerian Evidence Act of 1943 that the normal period of gestation for purposes of the second presumption was 270 to 280 days.[29]

At common law, these two presumptions were rebuttable; but the only way by which this could be done was by satisfactory evidence that the husband was "beyond the four seas" during the whole period of the wife's conception.[30] In particular, it was further established by the House of Lords in Russell v. Russell [31] that neither the wife nor the husband was competent to give evidence proving or tending to disprove the fact that sexual intercourse did not take place between them, or that there was no access between the spouses, at the time the child could have been conceived.

These common law rules were incorporated into the rather controversial section 147 of the Evidence Act, 1943 which is now contained in an identical section of the Evidence Act, 1958.[32] The section provides:

> "The fact that any person was born during the continuance of a valid[monogamous] [33] marriage between his mother and any man,

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27. (1946) 61 T.L.R.566; 115 L.J. Ch.89.

28. Co. Litt. 123b.

29. Bosville v. A.G. (1887) 12 P.D.177 at p.183; Burnaby v. Baillie (1889) 42 Ch. D. 282 at p.296.

30. Head v. Head (1823) 1 Sim. & St. 150 at 152; See also Morris v. Davies (1837) 5 Cl. & Fin. 163.

31. [1924] A.C.687. The rule was in fact first propounded in Goodright d. Stevens v. Moss (1777) 2 Cowp. 591.

32. Cap. 62, Laws of the Federation of Nigeria (1958 ed.).

33. This interpretation is implicit in the fact that a "husband" as used in s.147 of the Evidence Act is defined by s.2 of the Act as meaning the husband of a monogamous marriage.

> or within two hundred and eighty days after its dissolution,[34] the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man unless it can be shown -
>
> (a) either that his mother and her husband had no access to each other at any time when he could have been begotten; regard being had both to the date of the birth and to the physical condition of the husband; or
>
> (b) that the circumstances of their access, if any, were such as to render it highly improbable that sexual intercourse took place between them when it occurred:
>
> Provided that neither the mother nor the husband is a competent witness as to the fact of their having had sexual intercourse with each other where the legitimacy of the woman's child would be affected, even if the proceedings in the course of which the question arises are proceedings instituted in consequence of adultery nor are any declarations by them upon that subject deemed to be relevant, whether the mother or her husband can be called as a witness or not."

Despite the conclusive nature of these presumptions, it is clear that they are not juris et de jure since the so-called "conclusive proof" raised by the facts enumerated in the section could be controverted by evidence that the spouses had no access to each other at any time when the child could have been conceived, or that the circumstances of their access were such as to render sexual intercourse between them improbable. And like the rule in Russell v. Russell, the proviso to the section makes neither the husband nor the wife a competent witness to give evidence that marital intercourse did not take place in order to bastardise a child born during lawful wedlock or within 280 days after its termination so long as the wife remained unmarried. Neither is a declaration made by either spouse admissible to disprove the legitimacy of such

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34. The word "dissolution" is not defined but it seems to cover termination of marriage by death of the husband as well as by the court's divorce decree.

a child. Moreover, the incompetence of the spouses to give evidence of marital intercourse is regardless of the fact that the proceedings in which such evidence is sought to be adduced arises in consequence of adultery. And with regard to the period of gestation, it has been held obiter by Taylor C.J., in the Lagos case of Elumeze v. Elumeze [35] that the calculation of the 280 days starts from the date of pronouncement of the decree nisi and not from the date when the decree absolute was granted.

But it seems clear that evidence of non-access or that the circumstances of access was such that sexual intercourse was improbable, could be given by either spouse since the proviso to section 147 (a) and (b) of the Act only prevented the spouses from adducing evidence of absence of marital intercourse to bastardise the child.[36] This interpretation was, however, rejected by the Lagos High Court in Elumeze v. Elumeze, [37] on the ground that the mischief (i.e. undesirability of bastardising a child born or conceived within a lawful marriage) which the Act seeks to avoid by making the spouses incompetent to testify as to absence of sexual intercourse, would still exist if they were allowed to give evidence of non-access during the period of the marriage when the child could have been conceived. In the words of Taylor, C.J., "It seems to me that if the Act forbade one it equally forbade the other".

The undisputed facts of the case would seem to suggest that the decision of Taylor, C.J., which was affirmed on appeal by the Federal Supreme Court [38] on this point, should

35. Unreported, Suit No. H.D./41/64 of 10/4/67 of the Lagos High Court.

36. Cf. Kasunmu and Salacuse, op.cit., p.213.

37. Unreported, Suit No. HD/41/64 of 10/4/67.

38. Unreported, Suit No. SC. 79/1968 decided on 18/7/69.

be limited to the special circumstances of the case. The husband had been resident in the United States of America since August, 1948 before the wife, who was living in Nigeria, joined him there in October, 1950. In February, 1951, approximately five months after her arrival in America, she gave birth to a daughter. In a divorce proceedings later instituted by the husband in Lagos on the ground of the wife's adultery, he sought permission to give evidence that there was no access between him and the wife at the time the child was conceived and also that he had no marital intercourse with the wife during the period between her arrival in the United States in October, 1950 and the birth of the child on 21st February, 1951 presumably because of the advanced stage of her pregnancy. Indeed, "in a series of supplemental answers" by the wife to the husband's petition, she admitted that the marriage was never consumated because of the husband's refusal to have intercourse with her either in Nigeria or in the United States and that there was no children of the marriage. This later answer countermanded her previous statement that there was an issue of the marriage, i.e. the daughter whose paternity was in dispute.

Despite what appeared to be a virtual admission of adultery by the wife, the court chose, rightly in our view, to proceed on the logical basis that the issue was not merely concerned with the adultery of the wife but inseparably linked with the legitimacy of the daughter since the mother's husband, i.e. the petitioner, had denied her paternity in his petition. The Chief Justice had no hesitation in rejecting the husband's contention that he could adduce evidence of absence of sexual intercourse to bastardise the child since he was clearly rendered incompetent by the proviso to section 147 of the Evidence Act.

As regards the contention that the husband should be allowed to give evidence of non-access, the Chief Justice observed that medical evidence was lacking as to when the child could have been conceived. Was the child fully developed when it was born, in which case it would be clear that the child was conceived while the wife was in Nigeria, having regard to the fact that the period of gestation according to the section is about nine months? Or was it born prematurely in which case there was a possibility that it could have been conceived in America? According to the observation of the Chief Justice,

> "Common sense would dictate that a child born within five months of the first act of intercourse between a man and his wife would have little chance of survival, but can I on my belief alone without medical evidence say that the child in issue was not premature or in the words of the Act that there was no access at the time when the child could have been ... conceived" ?

It was on the possibility that the child might have been born prematurely that constituted the turning point in the case, though the Federal Supreme Court wrongly assumed that Taylor, C.J., dismissed the possibility of premature birth. The learned Chief Justice held that he could not allow evidence of non-access to be given by the husband to bastardise the child since there was no medical evidence to show that it was a fully developed child at the time of its birth, an evidence which could have conclusively shown that the child was conceived in Nigeria. In other words, if the child was, in fact, conceived in the United States and had been born after pregnancy of the mother for five months, to allow evidence of non-access to be given by the husband in order to show that there was no marital intercourse between him and the wife at a time when they were, in fact, living together would amount to letting in through another channel what the Act has expressly prevented. Had medical

evidence showed[39] that the daughter was not born prematurely, could Taylor, C.J., have been right in rejecting the evidence of the husband that there was no access between him and his wife at the time the child was conceived, since it would have been clear that the spouses were living at different countries at the relevant time? It is submitted that to disallow evidence of either spouse as to non-access under such circumstances would have been contrary to the provision of the Act.

After section 147 of the Evidence Act has declared the common law rules on presumptions of legitimacy with the slight modification noted above, the principle established in Russell v. Russell [40] was abrogated in England by the Law Reform (Miscellaneous Provisions) Act, 1949. The provision of this Act was later replaced by section 32 of the Matrimonial Causes Act, 1950. Section 43 of the English Matrimonial Causes Act, 1965 is the current enactment on the point. It provides that the evidence of a husband or wife is admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period, but that neither of the spouses is compellable. It will be recalled that all the various State High Courts in Nigeria are impelled by section 16 of the High Court of Lagos Act, and section 4 of the State Courts (Federal Jurisdiction) Act, to exercise their respective jurisdiction in

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39. It is surprising how it did not occur to the husband's counsel to obtain a certified true copy of the medical records of the child's birth from the Hospital or whatever medical centre or Home in the U.S.A. where she was born. Such statement would have been admissible under section 90 of the (Fed.) Evidence Act, 1958 without the necessity of calling the maker as a witness since he was beyond the seas. The fact that the child was already 16 years old at the time of the hearing might, however, explain the difficulty.

40. [1924] A.C. 687.

divorce and other matrimonial cuases relating to monogamous marriages in conformity with the law and practice [41] for the time being in force in England. In Elumeze v. Elumeze [42] the Federal Supreme Court held, rightly in our view, that section 32 of the English Matrimonial Causes Act, 1950, the predecessor of section 43 of the Matrimonial Causes Act, 1965, could not abrogate the provisions of the Evidence Act as regards the inability of spouses to give evidence of marital intercourse to bastardise a child born in lawful marriage, whatever the position might be in proceedings for divorce or other matrimonial causes. The net result of this situation is that for matrimonial causes, all the High courts in Nigeria do admit evidence of marital intercourse from the spouses [43] either to establish whether there has been condonation of a matrimonial offence, [44] or whether a marriage has not been consummated as a result of impotence of one of the spouses [45] or wilful refusal by either party.[46] Whereas, in cases where the issue is the legitimacy of the child, the spouses are incompetent to give evidence that marital intercourse did or did not take place during the marriage! Hence a glaring absurdity has arisen between proceedings for matrimonial causes and those relating to the legitimacy of a person.

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41. Emphasis supplied.
42. Unreported, Suit No. SC. 79/1968 decided on 18/7/69.
43. See e.g. Tinubu v. Tinubu [1959] W.N.L.R.314 at p.316; Udom v. Udom (1962) L.L.R.112.
44. Martin v. Martin (1931) 10 N.L.R. 92 at p.95.
45. Ogunmuyiwa, v. Ogunmuyiwa, Unreported decision of the Lagos High Court, No. WD/49/65 of 23/3/66; Akan v. Akan, Unreported decision of the Lagos High Court, No. WD/12/67.
46. Ofodile v. Ofodile, Unreported, Lagos High Court Suit No. WD/6/1965 decided on 7/3/1966.

It will be recalled that to such "grotesque conflict in the result of the two proceedings", as it has been appropiately termed by the House of Lords in Russell v. Russell, the House was not prepared to shut its eyes. In their lordships' view, to arrive at such conclusion would be ludicrous and incongruous. And it was in order to prevent such absurd result that would have arisen if the spouses were considered competent to give evidence of absence of marital intercourse in divorce and other matrimonial causes proceedings but incompetent in any proceedings in which the legitimacy of a child was in issue, that prompted the House to hold that the bar imposed on spouses as regards evidence of marital intercourse was not confined to legitimacy cases, but that it was "a general rule to be applied, in the full generality of its scope, to all cases which it is wide to cover".[47] Of course, the basis of the rule as given by the House of Lords was that decency, morality and public policy rendered it unbecoming and indecorous that evidence should be received from such quarters. In Nigeria, the basis of the rule has been found not maintainable as regards proceedings in matrimonial causes, but is still preserved for cases of legitimacy by section 147 of the Evidence Act. Also, as the following discussions will show, both the customary and the Moslem law which govern most people in Nigeria do allow evidence of marital intercourse to be given by spouses where such evidence is relevant to the determination of an issue. In view of this absurd result and lack of coordination of principles of customary law and statutory enactment governing the determination of a single status of legitimacy,

47. Russell v. Russell [1924] A.C.687 at p.720.

nothing more needs be said than to suggest that the Evidence Act should be amended so as to allow evidence or marital intercourse to be given by spouses in cases where the issue of legitimacy of a person is raised.[48]

Another unsatisfactory result of the statutory presumptions of legitimacy is the way the Act attempts to resolve the problem of turbatio sanguinis, ie.e where a woman remarried within a short time after dissolution of her previous marriage and gave birth to a child which could have possibly been conceived during the continuance of her first marriage. As we have observed, the section provides that legitimacy of a child born after dissolution of the mother's marriage should be presumed in relation to the mother's former husband only when the mother remained unmarried for 280 days after dissolution of her marriage. Thus when the mother remarried less than 280 days, any child begotten by her during the second marriage would almost invariably be deemed to the legitimate issue of the second husband even though the possibility exists that it could have been conceived during the first marriage. Consider, for example, the case of a woman whose husband died as a result of an accident. Three months later, the widowed woman remarried a man who, among other reasons, was anxious to give her protection.

Approximately eight months after the death of her late husband, but five months after her remarriage, she gave birth to a fully developed child. The arbitrary solution provided by section 147 of the Act is that the child is "conclusively" deemed the legitimate offspring of the second husband.

48. The law on this point has now been amended on similar lines as suggested; see the Postscript.

Even if both spouses are in agreement that there was no sexual intercourse between them until after the woman's remarriage three months after the death of her first husband, neither of them is competent to testify as to this fact, nor is a declaration made e.g. by the wife immediately after the death of her first husband that she had marital intercourse with the deceased husband the day preceding his death, receivable to disprove the legitimacy of the child in relation to the second husband.[49] And according to the unfortunate decision of Taylor, C.J., in Elumeze's case, the parties could not even give evidence of non-access at the time the child could have been conceived. Even under the common law which is purported to have been declared by the provision of the Act, it was well recognised by the earliest cases [50] on presumptions of legitimacy that it is necessary by the laws of nature for the man in whose favour the presumptions operate "to be, in fact, the father of the child".[51]

No doubt, a conflict of the two presumptions and hence conflict of paternity ought to be prevented as it has been done by the Evidence Act. On the other hand, the legitimacy of a child born in lawful wedlock ought to be safeguarded; not, however, by declaring a child the legitimate offspring of a person who is not, and who is fully convinced that he is not, the natural father of the child. It is submitted that the provision of the Act lacks a common sense approach in the sense that it fails to realise that in cases of turbatio sanguinis, the child whose legitimacy is in issue will invariably have a legitimate father. The real issue in

49. Both spouses are now competent witnesses as regards evidence of marital intercourse; see the Postscript.

50. e.g. Banbury Peerage Case (1811) 1 Sim. & St. 153.

51. Ibid at p.154, second answer.

such situation is to ascertain the person, whether the former or the latter husband of its mother, from whom the child derives its legitimate descent. To resolve the matter by insisting on the application of the above statutory presumption will not be more than an anachronistic adherence to an inadequate test to produce injustice in a changing society. Unless positive evidence is allowed to establish whether or not sexual intercourse between the spouses did take place,[52] coupled, if necessary, by serological examination of the parties concerned, the determination of the true paternity of a child will always be hampered by disallowing the evidence of those best able to know of the true position.

(b) Polygamous Marriages.

As indicated above, the rule that birth in lawful wedlock determines the legitimacy of a person applies also to children born during the existence of polygamous marriage by their parents.[53] It is clear that legitimacy is determined with the aid of the presumptions (i) that a child born within a polygamous marriage is deemed the legitimate child of the mother's husband and (ii) that a child born within a reasonable period after dissolution of the marriage is the legitimate offspring of the former husband of the mother. These are rules of customary law (including Moslem law) and have no connection with the statutory presumptions discussed above, which in any event, apply to monogamous marriages only.

Some observations may be made with regard to these presumptions. First, in the case of a Moslem marriage, birth in lawful marriage must have occurred not less than six months

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52. For the present position of the law on this point, see the Postscript.

53. See Bamgbose v. Daniel [1955] A.C.107(P.C.); Lawal v. Younan [1961] All N.L.R. 245.

from the date the marriage was consumated before a child of such marriage could be presumed the legitimate issue of the mother's husband.[54] On the other hand, in the case of customary marriage, no such limitation is imposed. Under customary law, it matters little when, during the subsistence of the marriage, the child was born. Right from the celebration of the marriage to its termination, any child begotten by the wife is presumed to be the legitimate issue of the husband. This rule was so strictly enforced that if a married woman abandoned her husband for another man for whom she had a child, such child would be deemed the legitimate issue of the husband in so far as the marriage between the mother and the husband had not been formally dissolved.[55]

There is also a divergence of approach between the various customary laws in relation to the second presumption. For example, under the Moslem (Maliki) law, the orthodox rule is that a child born of the wife within five years of dissolution of her marriage is the legitimate issue of the former husband.[56] But as pointed out by Professor Anderson, this period of gestation, though widely accepted in principle in the Moslem States of Northern Nigeria, is "seldom, if ever, applied in practice".[57] This is due to the fact that like some continental legal systems,[58] the Maliki law attempts to prevent legitimacy in relation to two fathers by restricting the right of a divorced or widowed woman to remarry within a certain period after the dissolution of her previous marriage as would

54. Ma'aji Shani, op.cit., p.18.

55. See Elias, The Nigerian Legal System, pp.307-8; Kasunmu and Salacuse, op.cit., pp.216-217.

56. Anderson, op.cit., p.214; Ma'aji Shani, op.cit., p.18.

57. Anderson, op.cit., p.214.

58. e.g. Germany, Switzerland and France. See E. Guttman, 5 I.C.L.Q. (1956) 217 at pp.227-229.

allow a child conceived before the dissolution to be born prior to her subsequent marriage.

This period of restriction on remarriage, known in Islamic legal parlance as 'Idda, varies according to circumstances. If the termination of the marriage is due to the death of the husband, this period of waiting lasts for four lunar months and four days. In the case of termination by divorce, it is three menstral periods or three lunar months, whether or not the divorced woman is past child-bearing age; while in the case of a woman who is of child-bearing age but who appears to be pregnant by reason of her having missed her mentral circle, the period of restriction on remarriage is one year or until such time as she gives birth to a child. It is interesting to notice that the husband is legally responsible, as a general rule, for the maintenance and accommodation of his divorced wife during the period of her disability to remarry. And in determining the various periods of restriction, expert evidence based on medical examination by doctors or "knowledgeable women" is always admissible to determine whether or not a widowed or divorced wife was pregnant or past child-bearing age immediately on dissolution of her marriage by death or divorce. Thus, it becomes obvious that only when a woman of a child-bearing age, having observed her period of waiting, refused to marry within five years after dissolution of her previous marriage, could the presumption arise that a child born within five years after the mother's previous marriage is considered the legitimate issue of the former husband.[59]

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59. Supra, note 57.

Furthermore, the two presumptions of legitimacy found in the Moslem law are, unlike those contained in the Evidence Act, easily rebuttable. This is done not merely by the spouses establishing non-access between them at the time the child was conceived, but by way of Lian - a proceedings instituted by the husband either to accuse the wife of adultery at the relevant time or simply to disavow the paternity of a child presumed to be his legitimate offspring.[60] Since the object of a Lian proceedings is to displace the presumptions of legitimacy, it naturally follows that the evidence of the spouses are freely given and carefully sifted by the courts in determining whether or not there was marital intercourse at the time of conception and hence determine whether the child is, in fact, the legitimate offspring of the mother's husband.

Presumably influenced by the Moslem law, similar restrictions on remarriage are placed on divorced women by statutory provisions declaring customary law in certain jurisdictions in Northern Nigeria so as to prevent a child being presumed the legitimate child of two fathers. For example, section 6(2) of the Declaration of the Biu Customary law on Marriage and Divorce,[61] 1964 provides as follows:

> "After divorce no woman shall contract a further marriage until one month has expired from the date on which divorce was awarded[62] .... or, if she is pregnant, until after she had delivered and weaned her child".

Section 13 and 14 of the Declaration then go on to provide that if, at the end of one month after divorce, the court is satisfied that the woman is pregnant, then the court should make an order

60. Ma'aji Shani, op.cit., p.16.

61. N.A.L.N.9 of 1964.

62. Judicial divorce under customary law is made by a single decree which is final and irrevocable.

awarding the custody of the child to the former husband as his legitimate child, the order taking effect when the child is born. Of course, under the provisions, the court has the power to order a child which has not been weaned to remain with the mother until it is old enough even though its legal custody has already been granted to its father. In the case of Idoma [63] and Borgu[64] Declarations, the period of restriction on the wife's right to remarry is, in each case, three months. And to ensure that she complies strictly with the prohibition, breach of it is even made a statutory offence punishable as stipulated in the Declarations.

It by no means follows that all the Northern Nigerian legal districts are unanimous in imposing a restriction on the right of a woman to remarry after dissolution of her marriage as a solution to the problem of turbatio sanguinis. One, if not the only, exception to this approach is the Igbira Customary law which merely provides that any child born within ten months after dissolution of the mother's marriage is the legitimate child of the mother's former husband. This rule came up recently for consideration before the Northern Nigeria High Court as Appeal Court for Civil Cases in Mariyama v. Sadiku Ejo.[65] Mariyama was the divorced wife of Ejo. After obtaining a divorce of her first marriage, she entered into a second marriage during which a daughter was born. The birth occurred about 300 days after she obtained a divorce of her first marriage. Ejo, the former husband, claimed this child as his legitimate issue in accordance with the Igbira customary law which

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63. N.A.L.N. 63 of 1959, ss. 7(2) and 17(1).
64. N.A.L.N. 52 of 1962, ss. 7(2), 17(1) and (b).
65. 1961 [illegible].N.N.L.R.81.

prescribed that a child born within ten months after the divorce of the mother belongs to the mother's former husband. The Igbira Central Court upheld this rule even though it was found that the first husband could not be the natural father of the child. On appeal, the court not only sought new evidence about the rule of customary law applicable but also admitted fresh evidence as to whether sexual intercourse took place between the parties at the time when the child could have been conceived. Consequently the court was able to uphold the finding of the lower court that the woman last had intercourse with the former husband fifteen months before the birth of the child. It however reversed the decision of the lower court by holding that the daughter was the legitimate child of the second husband.

As regards the customary law rule which said that a child born within ten months after divorce is the legitimate child of the former husband, Holden J., in giving the unanimous decision of the court, held that the welfare and interest of the child (which incidentally all courts in Nigeria are enjoined to consider as of paramount importance in any proceedings) demands that such customary law rule for determining legitimacy of a person should not be regarded as more than a rebuttable presumption of law and concluded his judgment by the following important remarks:

> "We must not be understood to condemn this native law and custom in its general application. We appreciate that it is basically sound and would in almost every case be fair and just in its results. There is a similar provision in Muslim law, and also in English law where there is a presumption in similar cases that the former husband is the father. That presumption we feel must be rebuttable if natural justice is to be done. In this case it has been clearly and absolutely rebutted, and in very exceptional circumstances of this special case we feel that to enforce the rule would result in a serious injustice."

In Southern Nigeria, customary law rarely insists on any restriction on the right of a divorced woman to remarry so as to allow the birth of a child conceived during the previous marriage. The position was however different under the traditional law with regard to a child begotten by a woman after the death of her husband. In tracing the development of the law from the traditional period to modern times, it will be necessary to make a distinction between determination of the legitimacy of a child born after the death of the mother's husband and a child born after the dissolution of the mother's marriage..

Under the traditional law, the rule with regard to the legitimacy of a child begotten by a woman after the husband's death had always depended on whether or not the mother had refunded to the family of the deceased husband the dowry or bride-price paid to her family at the time of the marriage. If such account remained unsettled, any child begotten by the widowed woman was considered the legitimate issue of the deceased husband, irrespective of whether or not he could have been the biological father. No doubt, this rule was an extension of the doctrine of widow-inheritance whereby a close relative of the deceased has the right to take the deceased widow and raise issues unto him through the woman. The relationship between the deceased relative and his widow is considered a continuation of the marriage previously existing between the dead husband and his widow. The only way this sort of relationship could be prevented or, having been brought into being, could be terminated is by the woman refunding to the substitute "husband" the dowry which was paid to her family at the time of the original marriage. On close analogy, therefore,

to this sort of leviratic union is the rule that any child born by the widowed woman even in concubinage is the legitimate issue of the deceased husband.

In Amachree v. Goodhead, [66] Beckley J., applied this rule and held that the fact that the child whose legitimacy was in dispute was born in concubinage after the death of the mother's husband did not preclude the child from being regarded the legitimate issue of the deceased husband, so as to justify awarding its custody and upbringing to the head of the deceased's family. In so holding, the judge felt no constraint in rejecting the contention that the strict application of the rule would be contrary to natural justice, equity and good conscience. But in Edet v. Essien, [67] the rule was rightly held to be repugnant to natural justice, equity etc. The case itself was concerned with the child betrothal of a girl, Iyang, to a man called Nyon Essien on payment by him of dowry to the girl's parents. Subsequently, when Iyang became of age, she agreed to marry another man, Ekpenyong Edet, who obtained the consent of her parents and paid another dowry to them. The dowry first paid by Essien was not refunded. [68] Nonetheless, a customary marriage took place between Iyang and Edet and out of this marriage the two children, whose legitimacy was in dispute, were born. Though ostensibly not their natural father, Essien claimed these children as his in accordance with the Calabar customary law.

66. (1923) 4 N.L.R. 101.

67. (1932) 11 N.L.R. 47.

68. Receipt by the parent of a girl of dowry from another man when the one previously paid by the existing suitor or husband has not been refunded is now a criminal offence in most jurisdictions in Southern Nigeria. See e.g. The Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order, 1958, s.6. This order as we have observed applies in the Western and the Mid-Western States.

The native court found that the rule was clearly established and therefore ordered the children to be handed over to Essien. But on appeal, the Divisional Court concluded that the rule was not successfully proved before it and therefore reversed the decision of the lower court by awarding the custody of the children to the mother's husband who, of course, was their natural father. Further, the court held that even assuming that such customary law rule had been successfully established, the court would have been duty bound to declare it contrary to natural justice, equity and good conscience under its statutory powers. From this decision, it becomes obvious that no court in Nigeria would now be prepared to enforce this archaic rule of customary law which gives the paternity of other person's children to another man simply because the dowry paid by the latter at the time of the mother's betrothal or marriage had not been refunded. It would also follow that the only way a court could determine, at customary law, whether a child born after the death of the mother's husband is the legitimate issue of the deceased husband is by satisfactory evidence that the child was conceived as a result of marital intercourse between the woman and the deceased during his life-time.

The question of the legitimacy of a child born by a woman during the existence of her subsequent marriage, but within some few months after dissolution of her previous marriage, depends on careful analysis of the facts of the case as presented by the parties. In illustration, the provision of section 13 of the Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order 1958 may be observed in this connection. It provides simply that

> "the husband of a woman shall be presumed, for the purpose of these Bye-laws, to be the natural father of any issue born or conceived by the woman during the period over which the marriage subsists."

As could be seen, nothing in the section prevents the courts from receiving evidence of absence of marital intercourse from either of the spouses to establish that the mother's husband is not the natural father of a child born during the existence of her marriage, and hence bastardise the child. Similarly, if a divorced woman gives birth to a child during the subsistence of a later marriage, evidence may be adduced by the former husband to show that the child was conceived during the woman's first marriage and hence establish that the child is his legitimate issue. These set of principles were established by some customary courts in the Western State of Nigeria as the logical interpretation of section 13 of the State's Adoptive Bye-laws Order 1958.[69] It is gratifying to observe that the view of the customary courts on this point has been affirmed by the State's High Courts.[70]

In Solomon Awolola v. Maria Adunola,[71] it was held by Fakayode J., that strict adherence to the customary law rule that the mother's husband is the legitimate father of a child begotten by his wife during the existence of their marriage may lead to injustice in some cases and that the correct approach to a case in which the paternity of such a child is in dispute should be as follows: The court should presume legitimacy of the child in relation to the mother's husband. This presumption

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69. See e.g. Karimu Akano v. Titilayo Abeke and Mudashiru Lawal v. Risikatu Atole, unreported decisions of the Grade B Customary Court (No.5), Ibadan, Western State, Nos. C5 277A/902 of 5/7/68 and C5 370/67 of 13/1/69 respectively.

70. In Isaac Bankole v. Israel Adeoye, unreported decision of Abeokuta High Court, No. AB/21A/67 of March 12, 1968; and Solomon Awolola v. Maria Adunola, unreported decision of the Oshogbo High Court, No. HOS/2A/68 of May 3, 1968.

71. Unreported decision of the Oshogbo High Court, No.HOS/2A/68 of May 3, 1968.

is rebuttable and the onus of rebutting it rests on the person, even if not the mother's husband, who alleges the contrary. In determining the issue, the court should have regard to all the circumstances of the case, including such factors as (a) opportunity of access for sexual intercourse between the husband and the wife at the time the child could have been conceived, (b) the physical condition of the husband at the material time, (c) opportunity of access for sexual intercourse between the wife and the third person, (d) the time of birth and the times of sexual intercourse by each contestant and (e) if the issue is still unresolved, blood test of the parties may be ordered. And as regards the last point, the case of Isaac Bankole v. Israel Adeoye [72] afforded an opportunity for the High Court to lay down detailed procedural rules regarding the admission of evidence of blood test to determine the paternity of such a child.

The justice of these rules was illustrated by the decision of a Grade B Customary Court in Western Nigeria. In Mudashiru Lawal v. Risikatu Atole,[73] the plaintiff was the former husband of the woman who was the respondent. Shortly after the dissolution of her first marriage to the plaintiff, she remarried and during the second marriage, a child was born in circumstances which raised the possibility that the child might have been conceived during the first marriage of his mother. The court considered the evidence of the first husband, the wife and the man who later became the woman's second husband, evidence which included testimonies as to whether or not there was sexual intercourse between the parties shortly before the

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72. Unreported decision of the Abeokuta High Court, No.AB/21A/67 of 12/3/68.

73. Unreported decision of the Grade B Customary Court (No.5) Ibadan, No. C5 370/67 of 13/1/69.

dissolution of the woman's first marriage. The issue was, however, still unresolved. The court therefore ordered a blood test which eliminated the possibility that the second husband could have been the natural father of the child whose paternity was in dispute. Custody of the child was therefore awarded to the first husband, the child being found by the court to be his legitimate issue. It is interesting to note that this was a case in which both the former and the present husband of the woman were anxious to know who the real father of the child was and in which the employment of the presumptions of legitimacy could have produced either a deadlock or an unsatisfactory result. This could well be illustrated by slightly reversing the facts of the case. Suppose the two marriages of the woman had been monogamous ones, the following results could have followed: Section 147 of the Evidence Act would have applied. Since the woman's second marriage took place within 280 days after dissolution of her previous marriage, and since the child whose paternity was in dispute was in fact born during the continuance of the second marriage, the statutory presumption would have operated to divest the child of having a legitimate relationship with its mother's first husband. The child could have been conclusively considered the legitimate issue of the mother's second husband who was in fact not the natural father of the child!

In summary, a comparison of the presumptive modes of determining the legitimacy of a child born within or shortly after the dissolution of any of the three types of marriage existing in Nigeria reveals the following defects in the law and lack of co-ordination of principles. These may be remedied in the way summarised below.

(1) THE EVIDENCE ACT AND MONOGAMOUS MARRIAGES.

In operating the presumptions of legitimacy, the existence of the bar which makes spouses incompetent to give evidence of absence of marital intercourse, or presumably that of non-access, to bastardise a child presumed to be legitimate is not maintainable, since it is capable of making the presumptions operate in favour of a person who is not the natural father of the child. The rule is also absurd in the sense that spouses could give evidence of marital intercourse in divorce proceedings which are not connected with the issue of legitimacy. If public policy is an indication of those matters which the legislature or the courts regard as inimical to the interest of the community as a whole, the reason adduced for the rule, i.e. that "morality, decency and public policy" demand the exclusion of evidence of marital intercourse by spouses, has no foundation in Nigeria since it is the practice of the customary courts to receive such evidence from spouses in all proceedings in which its admission will be relevant in resolving the issue in dispute: More so when these courts are concerned with establishing the legitimacy and rights and duties of preponderant majority of people in the country. Furthermore, since the rule has been abrogated in England from whence it was imported into the Nigerian law, there seems to be no further justification for adhering to it in Nigeria.

Secondly, we have noticed that section 147 of the Evidence Act makes 280 days the period of gestation for a woman who married under monogamy in Nigeria. Thus, when a child is born on the 285th day after the dissolution of the mother's marriage, the fact that the mother remained unmarried and that she was too ill to have sexual intercourse during the whole of

the period, would seem not to be relevant matters to be taken into consideration in determining whether such a child is legitimate or not. According to the section it would seem that such child should be considered illegitimate. Yet cases abound not only in Nigeria [74] but all over the world showing that the maximum period of gestation may at times be up to 300 days.

Further, to confound the situation, the section provides that the widowed or divorced woman should remain unmarried before a child born within 280 days after dissolution of the mother's marriage could be considered the legitimate issue of the former husband. This condition appears to us as a negation of common sense and justice. As the above case of Mudashiru Lawal v. Risikatu Atole[75] has shown, circumstances will always arise under which a divorced or widowed wife will remarry shortly after the dissolution of a previous marriage and give birth to a child conceived as a result of marital intercourse with her former husband. Yet the solution provided by section 147 of the Evidence Act is that such children must conclusively be presumed the legitimate issues of their mother's second husbands.

In our submission, the best approach to subh problems of turbatio sanguinis is to regard the presumption of legitimacy as a non-starter. The only means by which the real father of a child born under such circumstances could be established is by empowering the courts to receive evidence from those who are best able to know of the true position. In addition, in difficult cases, serological examination of the parties may be called in aid as it is being done not only under some systems of customary law in Nigeria, but also in most countries.[76] This will prevent

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74. See Mariyama v. Sadiku Ejo (1961) N.N.L.R. 81.

75. Unreported decision of Grade B Customary Court No.5, Ibadan, Western State, No.370/67 of 13/1/69.

76. E.g. in England; See the Family Law Reform Act, 1969, ss.20 to 25 of which give the English courts power to order blood test to determine the paternity of a child.

the injustice of making the husband of a wife maintain a child who is probably not his own and the disrepute into which the law is brought as a result of the rigidity and the inadequacy of the statutory presumptions of legitimacy. In this respect, a useful advice may be found in the Report of the English Law Commission on Blood Tests and the Proof of Paternity in Civil Proceedings[77] that

> "it is in the child's interest to know, if possible, the true position as to its paternity. Where a husband has denied being the father of his wife's child, but has been unable because of the strength of the presumption of legitimacy to prove that he is not, the emotional and financial effect on the child is not likely to be beneficial if the husband is nevertheless still firmly convinced that he is not its father".

That the situation should be as suggested above in Nigeria is born out by the fact that illegitimacy is not indelible. An illegitimate child can always be legitimated by the subsequent marriage of its parents or by mere acknowledgment by its putative father. Only when the law provides clear rules for identifying the real father of a child could such a father, if not the husband of the mother, be in a position to legitimate it by some subsequent act.

(2) MOSLEM LAW.

The Maliki law rule that a child, before it can be regarded as the legitimate issue of the mother's husband, must be born not less than six months after consummation by the parties of their marriage is ludicrous. How is the court to determine when a marriage is, in fact, consummated when there is a dispute between the spouses on the point? Or should the solution of the problem be the result of another presumption that a marriage is consummated on the wedding night? If so, what happens when the

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77. Law Com., No.16 of 1968.

husband was himself responsible for the ante-nuptial pregnancy of the wife when he was courting her? Should a strict application of this rule mean that even when it is glaring that both husband and wife are the natural parents of the child, it should still be considered illegitimate if born less than six months after the consummation of the parents' marriage? It is submitted that this condition is unjustifiable in view of the fact that a Lian proceedings is always available to the husband to disprove the paternity of the child presumed to be his according to Moslem Law.

Secondly, it is rather disconcerting that the right of a father under the Maliki law to bring a Lian proceeding should be limitless as to time. Obviously, a person once considered legitimate should not, in justice, have the question of his legitimacy hang in the balance throughout his life for the simple reason that his legal father may one day bring an action to disown him and render him a bastard. And finally, since the presumption that a child born within five years after the dissolution of the mother's marriage is the legitimate issue of the mother's former husband, is seldom applied in practice, there is no justification for the retention of such dead wood in the law.

(3) CUSTOMARY LAW.

By far the most satisfactory presumptive method of determining the legitimacy of children born within, or shortly after the dissolution of, a marriage is that found under some systems of customary law. Having started with such primitive rules that legitimacy is determined by the right to a refund of the dowry paid on behalf of the child's mother, it is

gratifying to note that customary law has been developed by judges to take account of the social, economic and even scientific development of the modern era. Here, as in the Maliki law, there is no restriction on spouses preventing them from giving evidence in any proceedings that marital intercourse did or did not take place during the marriage. Hence the presumptions are easy to rebut and are merely designed to assist the courts in straightforward cases. It will also be observed that it is under this system of law that the modern method of receiving evidence of blood test to determine paternity has been adopted. Unfortunately, however, the diversity and multiplicity of systems of customary law in Nigeria means that the law on this point cannot develop on the same scale throughout the country.

May we therefore suggest that the time is ripe for the respective Governments in Nigeria to adopt a uniform set of rules for determining the legitimacy of children born or conceived in lawful marriages, having regard to the criticism made of the existing rules and irrespective of whatever the nature of the marriage. For whatever the differences between the incidents of a monogamous, Moslem and customary law marriages, one thing is clear: each is a vehicle by which a child can attain legitimate status. And whatever the difficulty of integrating the Moslem law with other systems of secular law, whether based on customary or English law, this cannot be said of presumptions of legitimacy which is known, in one form or the other, in all the three systems. In adopting this approach, we shall be following the expedient of the Indian Parliament which has found it desirable for quite a long time to provide a single set of presumptions of legitimacy for births emanating from a monogamous as well as a Moslem marriage.[78]

78. See s. 112 of the Indian Evidence Act, 1872 and D.F.Mulla, Principles of Mohamedan Law, 16th ed., p.314 et seq.

3. LEGITIMATION BY SUBSEQUENT MARRIAGE OF PARENTS.

In Nigeria, a process by which a child born illegitimate according to the lawful wedlock theory can subsequently attain legitimate status is by the subsequent marriage of its natural parents. As pointed out above, legitimatio per subsequens matrimonium was one of the more tolerant modes of determining the legitimacy of a person under the Roman Law. It later passed into the Canon law about the 12th Century and gradually became the law of continental Europe from whence it found its way into the common law countries. Today scarcely is there any system of law both in the common law and the civil law worlds in which the conception has not been adopted.[79]

After abortive attempts, dating from the 13th Century, to introduce the concept into the English law, mainly on the basis that the Kingdom of England should be "wholly free from every kind of subjection to the Roman Empire",[80] legitimation of a person by the subsequent marriage of his parents was accepted in England in 1926 by the passing of the Legitimacy Act of that year. In 1922, following a decision of a Nigerian court which met with hostile reception by the public, it was suggested in the Nigerian Legislative Council[81] that legitimation by subsequent marriage should be introduced into the country's legal system. But by 1923, it had been discovered that a similar move was being made by the British Parliament. It was therefore decided to suspend the plan to introduce the concept into Nigeria until the English Legitimacy Bill was passed. This, as we have observed, was done in 1926. Three years later, a Legitimacy Act,[82] modelled on the English statute, was passed

79. See White, "Legitimation by Subsequent Marriage" in 36 L.Q.R. 255.

80. Dissertatio ad Fletan, ed. 1647, p.536, cited from White, 36 L.Q.R.255.

81. Legislative Council Debates, 7th Session, 1929, p.62.

82. No.27 of 1929.

in Nigeria with a minor but significant modification. This Act came into effect on 17th October, 1929.

Despite the co-existence of monogamy and polygamy in Nigeria, the Nigerian Legitimacy Act, 1929 is solely concerned, like the English Act, with legitimation of an otherwise illegitimate child by a form of subsequent marriage which is described by the Act as "the voluntary union for life of one man and one woman to the exclusion of all others."[83] In other words, only a subsequent monogamous marriage, as distinguished from a polygamous marriage, of the child's parents could confer the status of legitimacy on it. It is difficult to explain the exclusion of a polygamous marriage as a subsequent act which may legitimate an illegitimate child under the Act since it was sufficiently recognised by the Nigerian Legislative Council even in 1929 that the qeustion of legitimacy in Nigeria "is obviously one of considerable complexity involving as it does the consideration of questions of marriage in connection with native law and custom and also inheritance according to native law and custom".[84] We shall return later to the absurdity created by the failure of the Act to include customary or Moslem marriage as constituting a sufficient subsequent act which would legitimate an illegitimate child.

As a result of regionalisation in 1954, the Legitimacy Act, 1929 was re-enacted[85] by each of the three regional legislatures while the existing Act was retained [86] with certain routine

83. s.2.

84. Legislative Council Debates, 7th Session, 1929, p.62.

85. As Cap.62, Laws of Western Nigeria (1959 ed.); Cap.63, Laws of Northern Nigeria (1963 ed.); Cap.75, Laws of Eastern Nigeria (1963 ed.).

86. As Cap.103, Laws of the Federation of Nigeria and Lagos (1958 ed.).

amendments by the Federal Parliament for the then Federal Territory of Lagos,[87] now the Lagos State. With the creation of the new twelve states structure in 1967, all enactments existing in a Region out of which a state was created are deemed to be part of the statutes of the new state.[88] The effect of this is that the Legitimacy Laws of the former Regions of Nigeria now become the Laws of all the new states created out of them. Since all the Legitimacy Laws are identical as to name, sections and substance, it will not be necessary to refer to more than one of them in considering the concept of legitimation by subsequent marriage in all the Nigerian states.

Section 3(1) of the Western State Legitimacy Law provides as follows:

> "Subject to the provisions of this section, where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this law, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in the State render that person, if living, legitimate from the commencement of this law, or from the date of the marriage, whichever last happens." [89]

Thus, by this provision, it becomes obvious that only two conditions are relevant before the subsequent marriage of an illegitimate child's parents could render him legitimate. First, the putative father must have been domiciled within the state at the time of the marriage between him and the child's mother and secondly, the illegitimate child must be living at the date of

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87. See footnote 86.

88. See States Creation (Transitional Provisions) Decree, No.14 of 27/5/67, s.1(5).

89. The Word "Region" was used in the text. It should now be read as "State" ..... by virtue of s.1 (b) of the States Creation (Transitional Provisions) (Amendment) Decree, 1967.

its parents' marriage. It is not essential, for example, that the subsequent marriage be celebrated in good faith. Legitimation will be effected even though the parents go through a formal ceremony of marriage solely for the purpose of securing the legitimacy of their illegitimate children and without any intention of future cohabitation.

If the marriage took place after the commencement of the Law, then the legitimacy of the child commences from the date of the parents' marriage. If the parents had married before the commencement of the Law, the legitimacy of the child began from the commencement of the Law, i.e. 17th October, 1929. And for this purpose, it would seem that the death of one or both of the child's parents after their marriage but before October 17, 1929 does not affect the legitimacy of the child provided he was alive on October 17, 1929.[90]

By section 5 of the Law, a legitimated person is placed on equal footing with a person who is born legitimate for the purpose of testate and intestate succession and also for participating under any disposition which comes into effect after the date of his legitimation. Similarly, the spouse of a legitimated person, his children and remoter issue are all entitled to succeed to property, whether real or personal, in like manner as if the legitimated person had been born legitimate. But where property or succession rights depend on the relative seniority of children, and such children include a legitimated child, he ranks as if he had been born at the date of legitimation, whatever his actual age. And if more than one person became legitimated at the same date, they rank as between themselves in order of seniority. However since nothing prevents a person from excluding a legitimate child born in law-

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90. Cf. Kasunmu and Salacuse, op.cit., p.220.

ful wedlock, as well as a legitimated child, from the provisions of a will, or a disposition inter vivos, in which rights in property are given to his children, such intention if clearly expressed in such instrument with regard to a legitimated child is to be effective according to the section.

Where a person legitimated under the Law or any of his children or remoter issue dies intestate, the same persons who would have been entitled to succeed to his real and personal property had he been born legitimate are entitled to take.[91] Also, a legitimated person has the same rights and he is under the same duties for maintenance and support of himself or of any other person as if he had been born legitimate. Furthermore, he is similarly entitled to claim damages or compensation, allowances or benefits made available to a person born in lawful wedlock under any enactment existing in the State.[92]

It has been shown that before the subsequent marriage of his parents can legitimate an illegitimate child, he must be alive at the date of the parents' subsequent marriage or at the commencement of the Act. This limitation is somewhat neutralised by section 7 of the Law in respect of the illegitimate child who died after the commencement of the Law but before the subsequent marriage of his parents. Although such person remained in law an illegitimate person, any surviving spouse, children or remoter issue living at the date of the marriage can take interests in any property, whether real or personal, as if the illegitimate person had become legitimated by the subsequent marriage of his parents.[93]

In short, by giving a legitimated person capacity to inherit from, or to take under a disposition by, any of his

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91. s.6.
92. s.8.
93. s.7.

parents and to pass property to them; by imposing a mutual obligation of support and maintenance on both the legitimated person and his parents, and by conferring on him the right to claim compensations, damages, benefits and allowances accruing to a legitimate person under any enactment, legitimation per subsequens matrimonium, for all practical purposes, confers on the person thus legitimated full status of legitimacy as if he had been born in lawful wedlock. The only limitation placed by the Law on the rights of a person legitimated under it are that when there is a competition between him and children born in lawful wedlock as regards property or succession rights, he is deemed as to his seniority within the group as if he was born at the date of his legitimation and, consequently, can only take interests under wills and settlements which take effect after he has become legitimated.

A notable departure from the English Legitimacy Act of 1926 on which the Nigerian Legitimacy Laws are based is that, unlike section 1(2) of the English Act of 1926, the Nigerian enactments do not prohibit a filius adulterinus, i.e. an illegitimate child born at a time when both or either of his natural parents was married to a third person, from being legitimated.[94] The pragmatic explanation given by the Attorney-General for Nigeria for the omission of section 1 (2) of the English Act from the original Nigerian Act is that:

> 'In England, illegitimate children "were outcasts of society and a stigma attached not only to them but to their offspring. It is almost impossible to magnify the injustice and harshness suffered by these unfortunate persons whose status was occasioned by no fault of their own. Their incapacity as members of society was also extended to inheritance and no illegitimate person could inherit property

94. By virtue of ss.1 and 6(3) of the English Legitimacy Act, 1959, a filius adulterinus can now be legitimated by the subsequent marriage of his natural parents.

> on an intestacy. ...It is obvious that the same conditions do not apply in a country like Nigeria as they do in England; in view of the differences of native custom[95] the stigma of illegitimacy is not what it is in England".[96]

Thus, suppose F. and M. are the natural parents of S. At the time of S's birth, F., the father, was married to W., and M., the mother, was married to H. The marriage between F. and W. was dissolved by a court's decree while H., the husband of M. died as a result of a motor accident. Later F. and M. contracted a monogamous marriage. From the date of this marriage, S. becomes legitimate.

But suppose the subsequent marriage between F. and M. is a polygamous one, i.e. a customary law marriage or a Moslem marriage; Is S. legitimated by the subsequent polygamous marriage? Characteristic of most Nigerian statutes having their matrix in the English law, none of the States' Legitimacy Laws countenances the possibility of a later customary or Moslem marriage of the illegitimate child's parents as a sufficient act which would legitimate such child, since they all define a "marriage" for the purpose of the Laws not only as "the voluntary union for life of one man and one woman to the exclusion of all others" but further emphasised that they were providing for elegitimation by subsequent monogamous marriage by stipulating that the words "marry" and "married" anywhere appearing in the Laws should be construed with reference to a monogamous or "Christian" marriage. The inadequacy of the law in failing to assimilate polygamous marriages with monogamous ones for the purpose of legitimation by subsequent marriage has given rise to some absurdities as

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95. Emphasis supplied.
96. Nigeria, Legislative Council Debates, 7th Session, 1929, p.62.

aptly revealed by the obiter dictum of the Federal Supreme Court in the case of Cole v. Akinyele.[97] The facts of the case are not strictly relevant here and will later be considered in another context. Suffice it to say that the Highest Court in Nigeria held that it "would be contrary to public policy for [a person] to be able to legitimate an illegitimate child born during the continuance of his [monogamous] marriage.... by any other method than that provided for in the Legitimacy [Act]". In other words, since the various Legitimacy Laws provide for the legitimation of an illegitimate child only by means of a subsequent monogamous marriage of his parents, the court was of the view that neither a subsequent valid customary law or Moslem law marriage by the child's parents could legitimate him. Perhaps one should not quarrel with the view of the Supreme Court in so far as it only declared the clear intention of the Act without raising any objections against its provision.

But the vital question is, should the incongruous situation be allowed to continue, the respective legislatures having failed to address their mind to such absurdity at the time the Laws were being passed? Perhaps, one could excuse the unfortunate oversight on the part of the Colonial Parliament of Nigeria in failing to assimilate polygamous marriages with monogamous ones as sufficient subsequent acts whereby illegitimate children would be legitimated. The view of that era would seem to be that polygamy with its attitude to promiscuity, though tolerated, would soon died a gradual death with the spread of Western civilization. Could such absurdity in the law be

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97. (1960) F.S.C.84 at p.88.

allowed to persist now that all the various legal districts in Nigeria have acknowledged the fact that polygamy is as much a part of the fabric of the society that there could be no question of its abrogation in the foreseable future?[98] If one should take seriously such statements that the ultimate objective of the respective governments in Nigeria is to unify the "body of law derived from our customary laws ....with our local statutes",[99] one should have thought that a foreign concept of proven quality introduced into the Nigerian law should take account of all the legal institutions, whether customary or otherwise, which should logically act as conduit pipes for the operation of such concept. The result will then be a balanced adaptation of the conceptto Nigerian requirements.

Since monogamy and polygamy are mere forms of the same institution of marriage in Nigeria, the discrimination against polygamous marriages in this respect appears to us as artificial and unreasonable. It is accordingly suggested that each of the Nigerian States, especially those having no concept legitimation by parental recognition (see below), should amend its Legitimacy Law so as to enable a subsequent customary law or Moslem marriage to legitimate all illegitimate children hitherto born to the parties. What will be required to effect such a desirable change would be simply for each State to amend section 2, the definition section, of its Legitimacy Law so that the word "marriage", in addition to its present definition in the section as "the voluntary union for life of one man and one woman to the exclusion of others", will include "a marriage celebrated under customary law or Moslem law".

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98. See Record of African Conference on Local Courts and Customary Law, Dar es Salaam, 1963, pp.57, 71-72 and 81.
99. Ibid., at p.71.

4. LEGITIMATION BY PARENTAL ACKNOWLEDGEMENT OR RECOGNITION.

This last mode of conferring the status of legitimacy on an otherwise illegitimate child is a concept of the customary law, using the term "customary law" to include the Moslem law. It is the most controversial, the most mistated, presumably because of the unwritten nature of customary law, and the least favoured by the English-law-oriented judges of the superior courts of Nigeria who, as has been pointed out above, are always prepared to employ the elusive conception of public policy - the unruly horse - to hamper its latent development.

(a) Under Moslem Law.

To begin with and contrary to general belief, legitimation by paternal acknowledgment is not confined to the Yoruba areas or the Yoruba sub-groups in Nigeria and some localities in the Mid-Western State. Thus, according to a recent work[1] published by the Centre of Islamic Legal Studies at Ahmadu Bello University, Zaria, paternal acknowledgment is also a process of establishing legitimate descent under Maliki law as in other schools of Islamic law.[2] And the Maliki school of Islamic jurisprudence obtains in most of the States of Northern Nigeria. Briefly to deal with the Maliki law, it is well recognised that an illegitimate child may, under the following circumstances, acquire legitimate status from the time of its birth if his putative father publicly acknowledges him and treats him as if he were a legitimate child. For the purpose of paternal acknowledgment, a reciprocal recognition

1. Ma'aji Isa Shani, Digest of Maliki Family Law; see pp.19 et seq. where the concept is fully discussed.
2. See Re Ullee (Infants of Nawab Nazim of Bengal) (1885) 54 L.T. 286; on appeal from (1884) 53 L.T.712; See also, Mulla, op.cit., 16th ed., p.316 et seq.

by the child is not required unless he is an adult in which case an acceptance of the putative father as such is a necessary condition for his legitimacy. Secondly, the putative father must possess legal capacity. That is to say that he must be an adult, sane and capable of having sexual intercourse with women, presumably at the time of the child's conception, before he could validly acknowledge the offspring of his fortuitous connection. Furthermore, he must be much older than the person he seeks to acknowledge as to admit the possibility of a father and child relationship between them.

Thirdly, a valid marriage between the father and the mother of the child must have been possible at the time of the child's birth, a condition which presupposes that a child born to a man by a woman to whom she is related by reason of affinity or consanguinity could not be acknowledged by the putative father. Similarly, it would seem to follow that a filius adulterinus, in the sense of a child born to a man at a time when the mother was the wife or someone else, could not be legitimated by paternal recognition. Indeed, this seems obvious since under the Maliki law, a man may not marry a woman who is already married to another man or who is in the period of restriction imposed upon her following the dissolution of her marriage.[3] Otherwise, he would be committing the serious offence of Zina, i.e. illicit sexual relations, which is the subject of heavy penalties.

Fourthly, nothing prevents an acknowledgment of paternity from being made in favour of a dead child.

Under the Maliki law, no formal act, written statement or registration, is necessary for paternal recognition of an

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3. See above.

illegitimate child. All that is required for the subsequent legitimation of the child is that the putative father should, by some positive act, admit that he is the father of the child. The effect of a valid acknowledgment made under the law is that an acknowledged child acquires all the rights accruing to a child born in lawful wedlock. And once acknowledgment is made, it becomes irrevocable.

(b) Under Customary Law.

At customary law, legitimation by paternal acknowledgment is also found in the Lagos State, the Western State, the Mid-Western State and parts of the Kwara State.[4] The only jurisdictions, therefore, in Southern Nigeria in which the concept of legitimation by paternal acknowledgment is unknown are the Eastern Nigeria States. As regards these jurisdictions, it was stated by Ainley, C.J., in the Eastern Nigeria High Court case of Onwudinjoh v. Onwudinjo[5] and by William, J., in the Northern Nigeria High Court decision in Elizabeth Diri v. Bashinya Nyikwa[6] that evidence is lacking on the existence of legitimation by paternal acknowledgment in Eastern Nigeria.[7] On the other hand, despite overwhelming evidence to the contrary, Alexander, J., assumed in Re Edu Dien[8] that it was a universal concept of the Nigerian customary law and hence applicable to

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4. See J. Salacuse, A Selective Survey of Nigerian Family Law, pp.87-88, cited from Kasunmu and Salacuse, op.cit., pp.228-229.
5. (1957) II E.R.L.R.1.
6. Unreported, No. K/M.91/1965 decided on 25/10/65 at the Kano High Court.
7. See also, Obi, Ibo Law of Property, p.190; Modern Family Law in Southern Nigeria, p.299; O. Achike "Statutory and Customary Marriage: A Comparison" in 2 Nig. L.J. (1967) 49 at p.55 where he qualified the statement that the principle of legitimation by acknowledgment is not known in Eastern Nigeria by the assertion that it "is generally practised by the Ibos in Eastern Nigeria".
8. Unreported decision of the Lagos High Court No. N/3/64.

determine the legitimacy of a person who was subject to Calabar customary law in the South Eastern State.

Be that as it may, acknowledgment of paternity at customary law needs not necessarily be in writing[9] but could be established, as in Moslem law, by some positive act of the putative father, indicating that he recognises such child as his legitimate offspring during his lifetime. Thus, the following have been held as sufficient acts of paternal acknowledgment or recognition as a result of which an illegitimate child becomes the legitimate offspring of his natural father: Performance by the putative father of the naming ceremony of the illegitimate child,[10] the fact that the putative father performed it at a place not his house, with the intention of concealing the fact of his paternal relationship with the child from other members of his family being considered irrelevant;[11] Putative father providing medical attention for the illegitimate child after his birth[12] or after a serious accident;[13] Voluntary assumption by the putative father of support obligation towards the child coupled by his admission of the child into his household as a member of it;[14] Or causing the Birth Certificate of the illegitimate child to be issued with the surname of the putative father put on it.[15] For the last act to constitute one of legitimation by acknowledgment of paternity, it does

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9. As in Young v. Young (1953) W.A.C.A. cyclostyled Reports 19, where the putative father wrote a letter to his relative admitting paternity of a child. The letter was not discovered until after his death. Nonetheless, the child was held legitimated by paternal acknowledgment.
10. Phillips v. Phillips (1946) 18 N.L.R.102.
11. Akerele v. Balogun (1964) L.L.R.99.
12. Savage v. Macfoy (1909) I Ren. G.C. Rep.504.
13. Phillips v. Phillips (1946) 18 N.L.R.102.
14. Jirigho v. Chief Anamali (1958) W.N.L.R. 195.
15. Akerele v. Balogun (1964) L.L.R.99.

not matter that the registration of the child's birth was done by another person provided it has been done on the clear authority of the putative father.[16] And contrary to the statement of the law by Ademola, C.F.J., in Lawal v. Younan,[17] that an acknowledged child is legitimate "for certain purposes", there is no evidence under customary law to show that a child legitimated by paternal acknowledgment by any of the methods enumerated above is treated differently from a child born in lawful wedlock. Indeed, in the majority of cases in which the concept has come up for consideration before the courts, the vital issue in such cases has been whether an acknowledged child could inherit from his father, an issue which has always been resolved favourably to the acknowledged child. If it is recalled that succession rights constitute the major incident arising out of the status of legitimacy, the statement of the Chief Justice tending to limit the effect of legitimation by paternal acknowledgment appears to have been made per incuriam.

In considering the concept of legitimation by paternal acknowledgment in Nigeria, it will be necessary for purposes of clarity to discuss the topic under the following three categories: (i) Legitimation by Paternal Acknowledgment when there is no form of marriage or when the marriage is void; (ii) Legitimation by Paternal Acknowledgment when there are legitimate children of a valid Polygamous Marriage, and (iii) Legitimation by Paternal Acknowledgment when there are legitimate children of a valid Monogamous Marriage. Under these heads, it is proposed to show how the dualism of marriage law in Nigeria has introduced some complexities into the problem and how far the courts have responded to the difficulties thus created.

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16. Akerele v. Balogun (1964) L.L.R.99.
17. [1961] All N.L.R.245.

i. Legitimation by Paternal Acknowledgment when there is no form of marriage or when the marriage is void.

In Nigeria, a marriage which is void ab initio produces the same effect on the issue of such marriage as if the parents were never married. In both cases, the children of such association are illegitimate. This is not only true of issues of void monogamous marriages but also with regard to the issues emanating from void polygamous marriages. The former situation is governed by the common law rule which prescribes that children of void marriages are illegitimate and can claim no rights through the husbands of such void marriages. The second situation is brought about by rules of customary law of the respective jurisdictions in Nigeria, though, as the only system recognising the doctrine of putative marriage, the Moslem law clothes an invalid marriage with certain effects, one of which is that the children of such marriage are legitimate, provided that the marriage was contracted by the parties in ignorance of the impediments which invalidated it.[18]

Legitimation by paternal acknowledgment operates a process by which children of void monogamous and polygamous marriages, and children which are not the issues of any marriage, could acquire legitimate status in most jurisdictions in the country. Furthermore, this concept brings about the same result with regard to children of voidable monogamous marriages which have been annulled by court decrees. Often than not, the husband of such voidable monogamous marriage would have performed, before the annulment, acts from which it may be inferred that he had accepted the paternity of the children of such marriage.

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18. See Ma'aji Shani, op.cit., pp.12-13.

The earliest case in which the concept has been applied is that of Savage v. Macfoy.[19] There, as we have seen in our earlier consideration of the case in connection with the law governing the validity of marriage, two persons domiciled in Nigeria, at a time when the country had not become a federation, contracted a polygamous marriage which was declared invalid on the ground that the law of the husband's domicile of origin, i.e. Sierra Leone law, did not permit polygamous marriages. But with regard to the rights of the children of the void marriage to take on the intestacy of their father, Osborne C.J., held that since their paternity had been acknowledged by their father before his death, they were legitimate and entitled to take on the intestacy of the deceased father. Furthermore, he held that there could be no difference between the status of such children and those born in lawful wedlock. This point was amplified by the same judge two years later in the case of Re Sapara[20] where he stated that under the Lagos customary law, "a child's right of succession to his father's property can be legalised by mere acknowledgment without the necessity of any form of marriage between his parents".

In the earlier case, the learned Chief Justice had given the basic consideration underlying the concept when he remarked that

> "There has been divergence of testimony as to the details of this native law, but from all the evidence adduced, one fact stands out predominant, it is, the principal interests to be considered, are those of the ..... children".[21]

In other words, unlike the common law, the customary law dissociates the circumstances surrounding the birth of a child from the question of its social welfare. Therefore, the fact

19. (1909) I Ren. G.C. Rep.504.
20. (1911) 1 Ren. G.C.Rep.604 at p.606.
21. Savage v. Macfoy (1909) 1 Ren. G.C. 504 at p.508.

that the parents had breached some stringent prescriptions of the matrimonial law will not affect the status conferred by the law as a result of its recognition by the putative father. In short, customary law does not believe in visiting the indiscretions of the parents on their innocent offsprings. Of paramount importance to the law are the welfare and interests of the child. Thus analysed, the seeming irreconcilable view of Osborne, C.J., in Savage v. Macfoy,[22] i.e. that a person[23] who is not normally subject to customary law as will allow him to contract a valid marriage under it, many nonetheless take advantage of the customary law concept of legitimation by acknowledgment to legitimate the children of his void marriage - becomes intelligible. The net result of this judgment is that legitimation by paternal acknowledgment has been elevated from a principle of customary law and has become a concept of the general (i.e. territorial) law of the Lagos State applicable to all persons domiciled in that State, irrespective of racial identity.

In Phillip v. Phillip,[24] there was even no form of marriage between the intestate and the three women who each bore him a child. All these children were acknowledged by the deceased father during his lifetime and it was held that all the children were legitimate issues of the intestate, the effect of which was that they were entitled to succeed to his property.

The principle established in the above case has been applied in subsequent cases in the Western State[25] and the Mid-Western State[26] where similar rules exist in the customary laws.

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22. Savage v. Macfoy (1909) 1 Ren. G.C.Rep. 504 at p.508.
23. e.g. a European.
24. (1946) 18 N.L.R.102.
25. Lawal v. Younan [1961] 1 All N.L.R.245.
26. Jirigho v. Chief Anamali [1958] W.N.L.R.195.

We have also seen that the position is the same under the Moslem law which operates in most of the Northern Nigerian States, subject to the proviso that the putative father must have been capable of intermarriage with the child's mother before he can validly legitimate the child of their fortuitous connection by acknowledgment. To adapt, therefore, the words of Lord Phillimore in Khoo Hooi Leong v. Khoo Hean Kwee,[27] it is beyond dispute that it is a jural conception in these Nigerian States that a child may be legitimate though its parents were not legitimately married.

There is, however, still a lacuna in the law in some States with regard to the children of void marriages. These are, most of the Northern Nigerian States and the three Eastern Nigerian States. In the former, legitimation by paternal acknowledgment is a concept of Moslem Law of the Maliki School which operates in the States. It is therefore not a secular law which applies territorially but a religious personal law applicable to those professing the Moslem faith. The question is, should mere acquisition of domicile in any of these States, without an admission of the Moslem faith as well, operate to endow a putative father with capacity to acknowledge the illegitimate child of his void marriage, whatever the nature of usch marriage? It is submitted that, as the state of the law is, it will not.[28]

As previously stated, the principle of legitimation by paternal acknowledgment is not permitted by the domestic laws of the three Eastern Nigerian States. With regard to these jurisdictions, it has been stated that a void customary marriage

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27. [1926] A.C.529 at p.543; cited with approval in Bamgbose v. Daniel [1955] A.C.107.

28. Some suggestions to deal with such situation will be considered below.

has no legal effects.[29] Consequently, the wife of such marriage is considered as a feme sole and any child begotten by her is rightless as regards the husband of the void marriage.[30] The position is the same at common law in relation to the children of void monogamous marriages or the issues of voidable monogamous marriages which had been annulled. Since legitimation by paternal acknowledgment is not permitted in these places and since there is no statutory enactment preserving the legitimacy of the children of such marriages, there is no doubt that their illegitimacy is indelible, unless their natural fathers (or both parents) are prepared to go by the rather tortuous and expensive process of legal adoption [31] to remove the stain of bastardy attaching to them.

Presumably in mitigation of the deficiency of the law relating to the legitimacy of children of void and annulled marriages in the Northern and the Eastern Nigerian States, a timid but rather ingenious suggestion has been made [32] that the current English enactments on this point should be considered as part of the Nigerian law. In our view, there is no authority for this expedient but first, to deal with the English law; Section 11 of the English Matrimonial Causes Act, 1965, re-enacting similar provisions contained in the Acts of 1937 and 1950, alters the common law rule that a child of a voidable marriage is automatically bastardised by the court's decree annulling the marriage. In its place, the section provides that where a nullity decree is granted in respect of a voidable marriage, any child of such marriage is the legitimate offspring

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29. Obi, Modern Family Law in Southern Nigeria, p.181.
30. Ibid, Ibo Law of Property, p.190.
31. See the Adoption Law, 1965, No.12 of 1965.
32. by Messrs Kasunmu and Salacuse, op.cit., pp.210-212.

of the parties. In other words, the annulment of a voidable marriage no longer has a bastardising effect on a child begotten before the court's decree of nullity. In this respect the section impliedly recognises that there is no intrinsic difference between annulment of a voidable marriage (which the law regards as valid until terminated at the instance of one of the parties) and divorce. Both proceedings have identity of purpose, i.e. the legal termination of the conjugal union.[33] Secondly, it is provided by section 2 of the English Legitimacy Act, 1959, that the child of a void marriage should be treated as the legitimate issue of its parents, if at the time the child was conceived, or at the date of the marriage, if later, either of both parents reasonably believed that the marriage was valid.

It will be remembered that by virtue of section 16 of the High Court of Lagos Act and section 4 of the State Courts (Federal Jurisdiction) Act, all the various High Courts in Nigeria exercise their jurisdiction in relation to the annulment, dissolution and other matrimonial causes concerning monogamous marriages in conformity with "the law and practice for the time being in force in England."[34] Messrs Kasunmu and Salacuse, having asserted that section 11 of the English "Matrimonial Causes Act 1965" applies in Nigeria by virtue of the above provisions goes on to argue that section 2 of the English Legitimacy Act 1959 might also be regarded as applicable in Nigeria if legitimacy of children of void and voidable marriages " is regarded as incidental to ..... annulment of marriages".[35] The sole reason given by these learned authors for

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33. See Jackson, The Formation and Annulment of Marriage (1951) pp.75-76.

34. See the Postscript for the present position of the law on this point.

35. Kasunmu and Salacuse, op.cit., p.210 et seq.

the suggestion that the provisions of these two English Acts apply in Nigeria is that the interest of children born in voidable marriages in Nigeria demands such a course of action!

It is submitted that the view that section 11 of the English Matrimonial Causes Act, 1965 and section 2 of the English Legitimacy Act 1959 apply in Nigeria is devoid of reasonable foundation in logic and in principle. The identical provisions of section 16 of the High Court of Lagos Act and section 4 of the State Courts (Federal Jurisdiction) Act mean no more than they say. They only authorised the courts to exercise their jurisdiction in divorce and other matrimonial causes according to the English law on such matters. On a restrictive interpretation, it may even be stated, as it has been done by these learned authors, [36] that the provisions do not impose on the Nigerian courts any obligation to apply the substantive law on divorce and matrimonial causes obtaining in England, though as a pragmatic expedient, the provisions had been interpreted by the High Courts in Nigeria as justifying the application of the English substantive law in the absence of a Nigerian law on such matters. Nonetheless this broad interpretation cannot be taken as justifying the total application of the English Matrimonial Causes Act 1965. Section 11 of the Act is a provision on legitimacy and the mere fact that it was contained, presumably for convenience, in an Act entitled "Matrimonial Causes" does not make the section operative in Nigeria. As aptly pointed out by Professor Allott, [37]

> "Where there has been a specific adoption of English law on a particular topic, only so much of the English law as is specifically adopted will apply".

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36. Kasunmu and Salacuse, op.cit., p.106 in connection with "Termination of Statutory Marriage".

37. Essays in African Law, p.6.

Why should the positive test laid down in section 2 of the English Legitimacy Act 1959 for determining the legitimacy of issues of void marriages be operative in Nigeria? As admitted by Messrs. Kasunmu and Salacuse,[38] the invariable condition under which an English Act of general application may operate in certain States in Nigeria[39] is that it should have been passed in England before 1st January, 1900. This eliminates the applicability of the English Legitimacy Act, 1959. And to the best of our knowledge the Act has not been specifically adopted in any of the States. If we, therefore, accept the sole argument marshalled by these learned writers in favour of the applicability of this Act in Nigeria, i.e. that the legitimacy of children of a void marriages is an incidental matter to the annulment jurisdiction of the High Courts, then the following anomalous situation will arise in relation to the determination of the legitimacy of such children in Nigeria. At common law, a court decree is not necessary to annul a void marriage as opposed to a voidable marriage. Whether or not a nullity decree has been obtained, a void marriage is of no legal significance. If the applicability of section 2 of the English Legitimacy Act 1959 depends on the annulment jurisdiction of the States' High Courts, which is made exercisable in conformity with the current English law on such matter, then the result will be that section 2 of the Legitimacy Act 1959 will confer the status of legitimacy on issues of void marriages which had been annulled in Nigeria, but the section will be ineffective in respect of such children whose parents wisely refused to initiate some cumbrous and expensive proceedings of annulment to determine the obvious effect of their void marriages. Therefore, apart from the

38. op.cit., pp.208-209.

39. No English Statute of general application applies in the Western and the Mid-Western States of Nigeria by virtue of section 4 of Western Nigeria, Laws of England (Application)Law, Cap.60, (1959 ed.).

condition imposed by the English Act that there should be good faith on the part of either party to the marriage, the legitimacy of issues of void monogamous marriages will further be conditional on whether a nullity decree has been obtained by one of the child's parents in respect of their void marriage. If only for the confusion that such construction will introduce into the law, this view should be rejected.

Finally, all the points mustered by Messrs. Kasunmu and Salacuse in support of their view that the provisions of the English Acts are operative in Nigeria are based on the fundamental assumption that legitimacy is a matter incidental to marriage, or the annulment of marriage, and therefore should be classified as a matter within the legislative competence of the Federal Government under the Constitution.[40] Consequently, the two Federal Acts which impelled the High Courts in Nigeria to exercise their jurisdiction "in relation to marriage and the annulment and dissolution of marriage .... in conformity with the law and practice for the time being in force in England", also impelled them to apply the current English law on legitimacy since legitimacy is incidental to marriage or the annulment of it! This point will be fully dealt with in connection with the problem of choice of laws, but in the meantime it must be submitted that this view appears the result of muddled thinking. Legitimacy has never been considered a federal subject under the Nigerian Constitution. Therefore, any argument that the Federal Acts which authorised the courts to exercise jurisdiction on marriages and nullity of marriages in conformity with the current English law imports into Nigeria the current English law on the legitimacy of

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40. Item 23 of the Exclusive Legislative List of the 1963 Republican Constitution gives the Federal Parliament power to enact laws on "Marriages other than marriages under Moslem law or other customary law; annulment and dissolution of, and other matrimonial causes relating to, marriages other than

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children of void and voidable marriages goes into the melting point since the Federal Parliament has no power to enact laws on legitimacy.

The view that whenever there is a gap in the law in Nigeria, we should look to the English law for a ready-made solution provides no foundation for constructive or imaginative reform. The best approach should be to recognise the existence of such lacuna in the law and then devise a solution which will accord with the popular consciousness of the common weal, rather than to strain the language of the existing statutory provisions to achieve some imperfect remedy. To the problem of reform, we shall return at the end of this part.

ii. Legitimation by Paternal Acknowledgment when the illegitimate child's father is polygamously married and has legitimate children.

There are two situations which may arise under this category. An illegitimate child may be born to a man in concubinage either before or after his valid polygamous marriage of which there are legitimate children. On the other hand, during the existence of a valid polygamous marriage, he may form an illicit association with another woman who begat him an illegitimate child in addition to other children of his polygamous marriages. Could the putative father by acknowledging the paternity of such illegitimate children during his life make them legitimate from the time of their birth as other children born in lawful wedlock?

The law has been clarified as regards these two situations after some initial uncertainty created by the decision in

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F/note 40 cont. from previous page.

marriages...under Moslem law or other customary law".
Item 45 further provides that the Federal Parliament has exclusive power to enact laws on "Any matter that isincidental or supplementary ... to any matter mentioned elsewhere in this list".

Re Estate of Macaulay.[41] In that case, the facts were that the deceased, Herbert Macaulay, was the issue of a monogamous marriage who himself first, contracted a monogamous marriage in December, 1898. This marriage lasted approximately for six months as a result of the death of his wife in May 1889. There was no issue of the marriage. But prior to this marriage, Macaulay had had some illegitimate children born to him in concubinage. The paternity of these children was acknowledged by him. After the termination of his monogamous marriage by death of the wife, he contracted a set of four polygamous marriages as a result of which some children were born. And during the continuance of these polygamous marriages, other illegitimate children were born to him by different women none of whom was his wife. The paternity of these children was also acknowledged. The net result was that at the time of his death there were thirteen children claiming the right to succeed to his intestate estate. Since Herbert Macaulay was subject to the jurisdiction of the then Lagos Colony where all his properties were to be found, the distribution of his intestate estate fell to be made according to the provisions of section 36 of the Marriage Act which is as follows: On the death intestate of a person subject to customary law but who contracted a monogamous marriage under the Act, or on the death intestate of the issue of such person,

> "the personal property of such intestate and also any real property of which the said intestate might have disposed by will, shall be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estate of intestates" any customary law to the contrary notwithstanding.

Thus in the instant case, since Macaulay was not only the issue of a monogamous marriage but since he himself had contracted a

41. Unreported decision of the Lagos Supreme Court, No.AG.68 of 15/9/52.

monogamous marriage under the Act, even though at the time of his death he was polygamously married, the distribution of his intestate estate fell to be determined by English law. Therefore, it was necessary to know which of the thirteen children were legitimate so as to determine which of them were entitled to succeed.

It was on this point that the trial judge showed a fantastically naive idea about the process of classification as to what law, the Nigerian or the English law, should determine the legitimacy of the children and as regards which the West African Court of Appeal[42] was similarly confused. Thus, as could be seen, the section is only concerned with distribution according to English law but does not purport to authorise the Nigerian courts to determine who are to succeed to the property by reference to English law. But both Reece, J., the trial judge, and the West African Court of Appeal, decided that the persons entitled to succeed should be ascertained by reference to English law. Reece, J., decided that reference should be made to English domestic law on legitimacy and found that only children who were born in lawful monogamous wedlock were legitimate in England. Therefore, since none of the thirteen children of Herbert Macaulay was born within monogamous conjugal union, all were illegitimate and accordingly could not take on the intestacy of their father.

On appeal, the West African Court of Appeal (per Verity C.J., who gave the unanimous decision of the court) was of the view that it was "in complete agreement that it is the law of England that the local [Act] directs that reference should be made, though I consider that it is to distrubution and not to [the askertainment of the persons having the rights of?]

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42. Sub-norm, Re Sarah Adadevoh (1951) 13 W.A.C.A.304.

succession that accuracy demands the application of that law".[43] It is only by making an adjustment to the statement by the insertion of the words in the second brackets that the statement becomes intelligible. Otherwise it is difficult to see the distinction which the Chief Justice was trying to make between "distribution" and "succession". But if our supposed mistatement of the Chief Justice's words could be attributed to the reporter's error, the passage from the same page in his judgment precludes such a conclusion being reached. The court, having made copious references to English decisions on private international law[44] said:

> "In regard to the appellants, [i.e. the thirteen children] therefore, the question to be determined is whether in accordance with the provisions of the law of England relating to distribution they are the children of the deceased, that is to say his legitimate children, their status as such being determined, according to the law of England, by reference to the law of the domicile of their parents at the time of their birth".

Thus, while Reece, J., made reference to the internal law of England as the law applicable to determine the legitimacy of the children, the West African Court of Appeal proceeded a little further by holding that it was to the whole of English law, including its rules on private international law, that reference should be made. Fortunately, since the English conflict rule determines the legitimacy of a person by reference to the law of domicile of his parents at the time of his birth, the court was able to remit the case to the lower court with the direction that the issue of the legitimacy of the children should be determined in accordance with the Nigerian lex domicilii

43. Sub-norm, Re Sarah Adadevoh (1951) 13 W.A.C.A. at p.309.

44. viz., Re Goodman's Trusts (1811) 17 Ch.D.266; Sinha Peerage Case [1946] 1 All E.R.348; Baindail v. Baindail [1946] 1 All E.R. 342.

of the parents at the time of their birth.

That this interpretation is capable of producing an unreasonable result can be illustrated by the assumption that had the English Conflicts rule on this matter being that no effect should be given to status of legitimacy emanating from the polygamous marriage of the child's parents, then the Nigerian courts, operating in a polygamous society, would have been prepared to accept this supposed conflict rule of a monogamous society on the basis that section 36 of the Marriage Act compelled them to do so! It is, however, now unnecessary to belabour this point since the Privy Council has rightly held in Bamgbose v. Daniel [45] that the effect of section 36 of the Marriage Act is to fix the table of distribution in accordance with the English law, leaving the Nigerian law to determine the particular individuals who are entitled to participate in the distribution table, without any prior reference to the English law.

Reverting then to the question of the legitimacy of the children under the Lagos customary law to which all were subject, Jibowu J., on the retrial of the issue as ordered by the Court of Appeal, held that the children of the polygamous marriages were legitimate having been born in lawful wedlock. He also held that under customary law the other children were legitimate since their paternity had been acknowledged by their father during his lifetime. Nonetheless he refused to give them any interests in the intestate estate of their deceased father on ground of public policy. He said

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45. [1955] A.C.107; followed in Taylor v. Taylor (1960) L.L.R.286 and Cole v. Akinyele (1960) 5 F.S.C.84 at p.86.

> "The position is then that we have two conflicting systems of law: one which does not recognise a child as legitimate unless the parents are lawfully married, and the other, a crude rule obviously intended to meet the requirement of primitive society, which says that marriage is not necessary and the issue of concubinage or adulterous connection is legitimate as long as he is acknowledged by his father. Such a customary law ....offends against common sense, decency and public policy."

Regardless of the decision in Savage v. Macfoy[46] that there should be no difference between children whose paternity had been acknowledged by the putative father and those born in lawful conjugal union, Jibowu J., concluded that children legitimated by paternal acknowledgment would not be held legitimate so as to entitle them to succeed on the intestacy of their father when there are in existence children of a marriage recognised by law.

A second decision by the same judge involving the application of public policy to disinherit children legitimated by paternal acknowledgment is that of Alake v. Pratt.[47] Although in the case, the acknowledged children were claiming in competition with children born in monogamous marriage, it will be convenient in view of the public policy consideration involved to consider it at this juncture. Contrary to the brief and misleading statement of the facts of the case in the law report, the true position [48] was that One Dudley Coker, the deceased, contracted a monogamous marriage under the Marriage Act in 1906. The wife of this marriage died ten years later with two issues surviving her. They were the defendants in the

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46. (1909) 1 Ren. G.C.Rep.504.

47. (1955) 15 W.A.C.A.20.

48. As revealed by the decisions of the Lagos Supreme Court in Suits Nos. 400/1951 and 4289 of 6/4/1954. Cf. Nwogugu, J.A.L. (1964) at p.104.

present case. After the wife's death, Dudley Coker entered into an illicit union with a woman, Yeside, whose Moslem marriage with another man, Folawiyo, appeared to be still subsisting, although at the time of her illicit association with Dudley Coker, she was living apart from her husband. Out of this illicit association, two children (the appellants) were born and their paternity was duly acknowledged by Dudley Coker before his death. In a claim by the acknowledged children that they were entitled to share equally in the intestate estate of the deceased with the children of the monogamous marriage, Jibowu J., held that according to the Lagos customary law the illegitimate children of the deceased had been legitimated since their father acknowledged their paternity before his death. He further held, however, that it would be incompatible with public policy to accord them any succession rights in competition with children born in lawful wedlock and therefore excluded them. In the words of the learned judge,

> "Where there are children born in lawful wedlock, children born out of wedlock should be excluded from participating in the distribution of the estate of their father [but] if the children of the deceased are all of the same status, that is, born without marriage, they could inherit their father's property".

On appeal, the West African Court of Appeal held that the trial judge was wrong in excluding the acknowledged children from participating in the distribution of the deceased estate on the ground of public policy. The unanimous decision of the court was given by Foster Sutton P. and in his judgment, he observed:

> "I do not think for one moment that the court [below] intended to suggest that if such native law and custom were proved, and a child born out of wedlock was held to be legitimate under the law in Nigeria, there could, in effect, be different grades of legitimacy so as to affect their rights of succession. The evidence in this

> case is that under Yoruba Law and Custom all legitimate children are entitled to share in their father's estate, and the appellants having been held to be legitimate, I do not think the question of their parents' marriage is then a relevant subject for investigation. Nor do I think that public policy demands that the courts of this country should hold otherwise." [49]

The effect of this judgment is that it not only reversed the decision of Jibowu J., in the court below but also nullified the authority of his earlier decision in Re Adadevoh[50] that legitimation by paternal acknowledgment is a crude rule designed for a primitive society and that it offends against common sense, decency and public policy. Therefore, to restate the law on the authority of the above decision, it may be taken as now well established that an illegitimate child born either before, during or after the existence of a polygamous marriage of his putative father is legitimate if the paternity of such child is acknowledged by the putative father. After acknowledgment, such child has the same rights and is subject to the same duties as a child born in lawful wedlock since there are no different grades of legitimacy.

All the above cases, no doubt, originated in Lagos. But since the principle of acknowledgment is not confined to this state, the reinterpretation of customary law made in these cases has been accepted in other States in Nigeria. Thus, in the Mid-Western State case of Jirigho v. Chief Anamali,[51] the question was the rights of acknowledged children to claim for wrongful death of their father under the English Fatal Accidents

49. (1955) 15 W.A.C.A.20 at p.21.
50. (1951) 13 W.A.C.A.304.
51. [1958] W.N.L.R.195.

Acts of 1846 and 1864.[52] The deceased had died as a result of the negligent driving of a motor vehicle by the defendant. The plaintiff who was the deceased's mother claimed compensation on behalf of herself, the widow and the six children of the deceased under the Fatal Accidents Acts for the wrongful death of her son. Under section 2 of the Act of 1846, action for compensation may be brought, inter alia, for the benefit of the child of the person whose death shall have been accidentally caused. But by section 5, a child is defined as a son or daughter, grandson or grand-daughter, stepson or step-daughter, but excluding an illegitimate child.[53] It was therefore imperative for the court to determine whether the six children came within the terms of the Acts. Duffus J., found as a fact that only one of the six children was born in lawful polygamous wedlock while the rest were issues of adulterous connections the deceased had with different women during his lifetime. He also found that the deceased acknowledged the paternity of the five illegitimate children during his lifetime and that according to the Kwale customary law, they become legitimate and rank with the child of the valid marriage in all respects. He therefore concluded that the five children legitimated by paternal acknowledgment were, together with the one born in lawful wedlock, within the meaning of the Fatal Accidents Act 1846 and as such were entitled to be considered for awards of damages. If illegitimate children born during the continuance of a valid polygamous marriage could be legitimated by paternal acknowledgment, it follows, a fortiori, that such children born

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52. The Acts are entitled "An Act for Compensating the Families of Persons Killed By Accidents" 9 & 10 Vict. Cap. of 1846 and "Accidents Compensation Act", 27 & 28 Vict. of 1864. The latter Act provides that the two Acts should be read as one.

53. Dickinson v. North Eastern Railway Company (1863) 9 L.T. 299 at p.300.

before or after the marriage could also be legitimated by paternal recognition.

It appears that the position is the same in the Western State,[54] not only because it is a Yoruba tribal area as Lagos, but more importantly by virtue of the State's Marriage, Divorce and Custody of Children Adoptive Bye-laws Order which provides that "paternal rights shall normally be awarded to the natural father whether or not such natural father is married to the mother" and then goes on by way of proviso that the husband of the mother shall be presumed the natural father of a child born or conceived during the subsistence of their marriage. This provision, it is submitted, makes nonsense of any rule of public policy which categorises the concept of legitimation by paternal acknowledgment existing under the State's customary law as a crude rule designed for a primitive society. It seems certain that the courts of the Western State will uphold the legitimacy of a child legitimated by the acknowledgment of his paternity by his natural father, whether such child was born before, during or after a valid polygamous marriage of his putative father, and whether the acknowledged child was born to the putative father by a married or unmarried woman.

A point of great difficulty against this contention is the case of Oladele v. Akinsola,[55] a decision of the High Court of Western Nigeria given at the Abeokuta Judicial Division. But that decision loses its authority as a binding precedent since it was given per incuriam. The facts of the case are

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54. See P.C. Lloyd, op.cit., pp.78 and 297; subject to the criticism of his statement of the Yoruba law as made above. Indeed, a Yoruba person's mind will recoil at the statement that a child born to a deceased man by a concubine establishes his rights as a legitimate child by contributing towards the funeral expenses. See p. 287.

55. Unreported, Suit No. AB/7/63.

rather involved but the relevant parts may be summarised as follows: W. was the wife of H., their marriage, validly contracted under customary law, not having been dissolved. During the existence of this marriage, W. formed an association with X. who was himself polygamously married. As a consequence of this association S., the plaintiff, was born. The paternity of S. was acknowledged by X. by his performance of the naming ceremony of the child. Two months after the birth of the child, X died as a result of a motor accident caused by the negligent driving of the defendant. Together with other children of the deceased, S. claimed under the Western Nigeria Torts Law [56] for compensation for the wrongful death of X. With regard to the claim by S., Beckley Ag.J., held that although S. was acknowledged by the deceased father as his son during his lifetime, nonetheless, it would be contrary to public policy to let him in as a legitimate child of the deceased for the purpose of claiming compensation under the Law, since S. was the issue of an adulterous relationship.

It is submitted that this decision is palpably wrong within the context of the Western Nigeria Torts Law. Section 4 of the Law provides that compensation for negligent death may be claimed for the benefit, inter alia, of a child of the deceased. Section 5 goes on to say that for the purpose of the Act, "a person shall be deemed to be the ..... child of the deceased person notwithstanding that he was only related to him illegitimately". From these two sections of the Law, it therefore becomes clear that a decision on the legitimacy of the child was not called for. A child needs not be legitimate to claim under the Act. Therefore, the pronouncement of Beckley, Ag. J., that the child of an adulterous relationship could not be

56. Cap.122, Laws of Western Nigeria (1959 ed.).

legitimated by paternal acknowledgment must be discountenanced since it was vitiated by his unfortunate oversight of the statutory provision on the point at issue. This decision also illustrates that "public policy", in relation to the concept of legitimation by paternal acknowledgment in Nigeria, has become a term of art for expressing the idiosyncratic preferences of individual judges for what is considered best for the public good. Whether or not such expendiency is completely out of tune with the good of the community in which they operate, or is contrary to clear provisions of the law, seems irrelevant.

iii. Legitimation by Paternal Acknowledgment when the illegitimate child's father is monogamously married and has legitimate children.

Most of the problems arising here are similar to those encountered when considering the claim of an acknowledged child in competition with legitimate issues of a polygamous marriage. They also admit of the same solution. Thus, for instance, if a man had an illegitimate child before his monogamous marriage to a woman not the mother of the child, such child attains the same status of legitimacy as that of a child begotten during the subsequent monogamous marriage of his putative father, provided his paternity has been acknowledged by the father.[57] If the illegitimate child was born after the dissolution of

57. Taylor v. Taylor (1960) L.L.R.286.

the monogamous marriage of his father, he is also legitimate frm birth if the putative father acknowledges his paternity.[58]

The position is, however, different when a father seeks to acknowledge an illegitimate child born to him during the continuance of his monogamous marriage. This is where the Nigerian law differs from those of other countries whose legal systems permit of legitimation by parental acknowledgment and where comparison of the Nigerian law with those systems of law will be a rewarding exercise in relation to reform proposals. The first decision in which the principle of acknowledgment in respect of an illegitimate child born during the existence of a monogamous marriage between the putative father and a woman not the mother of the child, was refused on the ground of public policy is that of the Federal Supreme Court in Cole v. Akinyele.[59] Albert Abimbola Cole, the deceased, twice entered into a valid monogamous marriage under the Nigerian Marriage Act, his first marriage having been terminated by the death of his wife. The respondent was the issue of the first marriage. The second marriage was childless. But in addition to these two marriages, the deceased maintained an irregular union with a woman for many years during the duration of these two marriages. Out of this association, two children, the appellants, were born. The elder child was born during the continuance of the first marriage while the younger was begotten six weeks after the death of the first wife but before the deceased's re-marriage to the second wife. In the words of Brett, F.J., "it is not disputed that during his lifetime the deceased openly acknowledged

58. Alake v. Pratt (1955) 15 W.A.C.20.
59. (1960) 5 F.S.C.84.

the appellants as his children and treated them as such". On the death intestate of their father, therefore, the acknowledged children, not unnaturally, sued in reliance on the Lagos customary law for a declaration that they were the legitimate children of the deceased and that they were entitled to equal shares with the child of the monogamous marriage in their father's property.

In the lower court, Kaine, J., held both acknowledged children illegitimate on the ground that they were the offsprings of a promiscuous relationship, a relationship which he found incompatible with monogamy. In so holding, he considered it unnecessary to differentiate between the elder child who was born during the subsistence of the first monogamous marriage and the younger one who was born when the father was a widower, on the footing that the latter "was already in being" before the death of the deceased's first wife. In other words, since the deceased could not have married the mother of the acknowledged children at the time when the first was born or when the second was conceived, acknowledgment of paternity by their natural father did not legitimate them.

On appeal, the Federal Supreme Court adopted a preeminently illogical attitude towards the issue by considering the legitimacy of the two children separately. With regard to the child born during the existence of the monogamous marriage it held, affirming the decision of the lower court, that it would be contrary to public policy for the natural father to be able to legitimate his illegitimate child, who was born during the existence of the father's monogamous marriage, by any other method than that provided for in the Legitimacy Act. To put it more lucidly, since the Legitimacy Act permits only legitimation by subsequent <u>monogamous</u> marriage of

the illegitimate child's parents, neither acknowledgment of paternity by the putative father nor a subsequent polygamous marriage by the parents, could legitimate such child. This is regardless of the facts (i) that legitimation by subsequent monogamous marriage is not intended to displace all other processes of attaining legitimate status in Nigeria but to supplement them and (ii) as pointed out by the Federal Supreme Court itself, that a man who was previously married under monogamy can go back to polygamy after a valid termination of his monogamous marriage. In any event, the view of the court was that "to hold otherwise would almost be to reduce the distinction between the effects of the two forms of marriage to a matter of words",[60] - a view which would seem to suggest that the Federal Supreme Court was going back on the opinion of the Privy Council in Bamgbose v. Daniel [61] that the Nigerian Legal system, like some others, had moved away from the position that legitimacy and a valid marriage between the natural parents of a child are correlative factors.

With regard to the second illegitimate child who was born after the death of the first wife, even though conceived during the existence of the monogamous marriage, the court reversed the decision of Kaine J., by holding that there was no rule of public policy which excluded his legitimation by paternal acknowledgment since he was "born at a time when his father was free to marry whom he chose".[62]

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60. (1960) 5 F.S.C.84 at p.88.
61. [1955] A.C.107.
62. (1960) 5 F.S.C.84 at p.88.

It will be recalled that what the court was minded to prevent, by its application of public policy to strike down legitimation of the first child by paternal acknowledgment, is the "encouragement of promiscuous intercourse" between parties to a monogamous marriage, and, hence, prevent the reduction of the distinction between the effects of monogamous marriage and polygamous marriage to a matter of words. But since both children were the offsprings of a promiscuous relationship (regardless of the fact that only one was actually born during the continuance of the father's monogamous marriage, the other being born six weeks after its termination), the court, no doubt, recognised the disparity in its findings regarding the legitimacy of these two children and felt constrained to rationalize it by the following observation:

> "When a man indulges in irregular unions, no rule regarding the legitimacy or legitimation of his children, however liberal, can altogether avoid anomalies. It goes without saying that the two appellants are equally free from blame for the circumstances of their birth, and in the present case the conduct of their father and mother was morally and legally neither more nor less culpable when the first appellant was conceived than when the second appellant was. Nevertheless, it so happen that before the birth of the second appellant the lawful wife of their father.... .... had died, and I feel bound to hold him legitimate since his paternity has been acknowledged by the father." 63

With respect, it is submitted that this rationalization of the rule of public policy which bastardises an adulterine child if born during the existence of a monogamous marriage but legitimates it if it happens to be born after the end of such marriage, even when conceived at a period when the marriage subsists, is total unconvincing.

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63. (1960) 5 F.S.C.84 at p.88.

The rule in Cole v. Akinyele [64] has evoked a lot of criticism by academic writers[65] who are of the unanimous view that the limitation placed on the concept of legitimation by paternal acknowledgment in this case is an attempt, hitherto successful, to fix the Nigerian law on legitimacy into the scheme of the common law of England without having regard to the basic social and economic differences[66] which exist in the two countries. Nonetheless, the rule has been confirmed by the Federal Supreme Court in Abisogun v. Abisogun [67] and followed by the Lagos High Court in such cases as Jose Williams v. Babatunde Williams,[68] Akerele v. Balogun [69] and Graig v. Graig.[70]

Cole v. Akinyele and other cases following it are concerned with the Lagos law. But in view of the fact that it is a decision on public policy by the Federal Supreme Court, there is no doubt that it will be generally followed in the Western State and the Mid-Western State where the principle of legitimation by paternal acknowledgmemt operates. The Maliki law has a similar, if not stricter, rule. With the state of existing law, therefore, it is our considered opinion that only legislation could reverse the unsatisfactory position of the law in this respect. What we propose to do in the rest of this part is to stimulate the imagination by showing that the approach of several countries, particularly in the Western

64. (1960) 5 F.S.C.84 at p.88.

65. See e.g. Nwogugu, 8 J.A.L.(1964) 91, at p.100 et seq.; Kasunmu and Salacuse, op.cit., p.236 et seq.

66. Unlike in England, there are no social institutions in Nigeria where hard-pressed mothers could jettison their illegitimate children. This factor alone would seem to justify the encouragement of a principle which allows natural fathers to assume voluntary responsibility for the welfare of their children.

67. [1963] All N.L.R.237.

68. No. M/112/63 decided on 11/11/63.

69. (1964) L.L.R.99 70. (1964)L.L.R.96.

civilization, to the problem of illegitimacy in modern times reflects an active and extensive movement towards the reform of their laws on a line favoured by the principle of acknowledgment which, unfortunately, the Nigerian courts are now rejecting. For despite the assertion by Ademola C.F.J., in Lawal v. Younan [71] that "legitimacy in England is a different concept to legitimacy in Nigeria", there is no doubt that the limitation placed on the principle of legitimation by paternal acknowledgment is still being dictated by a supposed universal principle of "Christian morality" with its Biblical concept of sin as a contagious matter which may be transitted from parent to child. But before we consider the present position in the European laws, we would like to point out that the Ghanaian courts have not accepted the rule of public policy which forbids an adulterine child from being legitimated by paternal acknowledgment.

In Wilson v. Wilson[72] Edward B. Thomson, a native of Lagos, contracted a monogamous marriage under the Marriage Act in Nigeria. Later, both he and his wife left Nigeria for Ghana where, after several years' residence, they died; the wife in October 1902 and the husband in October, 1912. There was no issue of the marriage. But during the continuance of the marriage, E.B. Thomson purported to contract in Ghana a customary law marriage with a Ghanaian woman of the Ga tribe. The court found no hesitation in holding the customary law marriage void since the effect of the then identical Marriage Acts of Nigeria and Ghana was that a customary law marriage contracted during the existing monogamous marriage was void. The plaintiff, born about nine months before the death of Thomson's lawful wife,

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71. [1961] 1 All N.L.R.245.
72. (1925) Div. Ct. (1921-25) Rep.155.

was the issue of the second (void) marriage. On the death intestate of E.B. Thomson, the plaintiff claimed that he was the legitimate child of the deceased and therefore entitled to succeed on his intestacy.

In the Divisional Court, Michelin C.J., resolved the issue of legitimacy of the plaintiff by holding as follows:

(1) That despite his several years' residence in Ghana, E.B. Thomson still retained his Nigerian domicile of origin since he had no intention at any time during his life-time to reside permanently in Ghana.

(2) That his Nigerian law of domicile governed succession to his property and also decided whether the child of his void customary law marriage was legitimate.

(3) That it was clearly established before him, and in particular, having regard to such Nigerian cases as Savage v. Macfoy[73] and Re Sapara,[74] that an illegitimate child could be legitimated by acknowledgment by his putative father.

(4) That E.B. Thomson acknowledged the paternity of the plaintiff according to Lagos customary law by a series of acts during his lifetime viz., by naming him immediately after his birth, by arranging for his baptism and giving the child his surname, and by accepting full responsibility for the child's education in Lagos, Nigeria, until his death.

He therefore concluded that the plaintiff was entitled to inherit both the real and personal property of the deceased as his

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73. (1909) 1 Ren. G.C.Rep.504.

74. (1911) 1 Ren. G.C. Rep.604.

legitimate child. Even though it was "abundantly clear" to the Chief Justice that the plaintiff was born illegitimate during the existence of a monogamous marriage between his father and a woman not his mother, and indeed, that his paternity was first acknowledged during the continuance of the marriage, he could see no rule of public policy which justified the non-enforcement of a clearly ascertained rule of a foreign law which is almost identical with the Ga customary law of Ghana.

5. MODERN TRENDS IN THE LAW OF LEGITIMACY IN FOREIGN COUNTRIES.

As indicated in our introduction to this Chapter, many countries in the monogamous world have discarded the doctrine of making birth in lawful wedlock a sine qua non of legitimacy and permit legitimation of adulterine children not only by subsequent matrimony but also by other methods. In these countries it has long been recognised that no amount of legal restrictions could prevent the obvious fact that sexual relations and living together can and do take place outside the legally sanctioned marriage relationship: That the bye-product of a strict legal regulation of marriage, i.e. monogamy, is birth of children outside wedlock; and that instead of visiting the sins of the parents on the offspring of their indiscretion, the law, even if it penalizes pre-marital or extra-marital relationships by criminal and quasi-criminal sanctions, should consider the interest and welfare of the innocent child as of paramount importance to his acquisition of legitimate status, rights, privileges, etc. in society. In other words, there is a growing universal rejection of the philosophy of law which discourages bastardy by denying the right of inheritance or of support to illegitimate children and an acceptance of the

view that the time is ripe for disassociating the wrongful conduct of parents from the general well-being of the child.

Three methods are found in the modern laws for catering for the problem of illegitimacy. One is to preserve the illegitimacy of children who are not born in lawful wedlock or who are not issues whose parents' subsequent marriages had legitimated, but to enact laws by which both legitimate and illegitimate children may inherit from their parents on equal basis. This method is now found in England. The second, which is more favoured by the American and continental systems of law is to provide by statutes, either in substitution for or in addition to legitimation by subsequent marriage, that an illegitimate child may attain full status of legitimacy upon express or public acknowledgment of his paternity by the father. The third is to make a complete abrogation of the status of illegitimacy and to make, through statutory provisions, all children, whether born in or out of wedlock, legitimate and entitled to equal rights under the law. We shall deal, firstly, with legitimation by paternal acknowledgment or recognition, and in this respect our attention will be concentrated on the American jurisprudence mostly because of its common law connection and the easy availability of materials. This done, we shall consider, very briefly, the existence of the second and the third expedients in the legal system of individual countries.

A notable feature of the American concept of legitimation by parental acknowledgment is that it is all a matter of statutory regulation. The effect of this is that legitimation by acknowledgment is available to every person, who, according to conflicts rules, is subject to the law of the State having

such concept. As could be expected, there are some divergencies in the laws of the twenty odd States operating this concept. For the purpose of this short survey, a discussion of the American concept could conveniently be divided into three groups: (a) those States permitting acknowledgment without writing, (b) those States providing for a written acknowledgment, and (c) those States permitting acknowledgment by other methods.

(a) Acknowledgment of paternity without any necessity of writing as a means of conferring the status of legitimacy on an otherwise illegitimate child is found in seven States of America, viz., California,[75] Idaho,[76] Montana, [77] North Dakota,[78] Oklahoma, [79] South Dakota,[80] and Utah.[81] These States each have almost identical provision saying:

> "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of the wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such, such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this Chapter [i.e. on Statutory Adoption of Children] do not apply to such an adoption".

The last sentence in the provision is obviously inserted, abuntela cautela, so that the words "thereby adopts" in the provision will not be confused with Statutory Adoption since both legitimation by acknowledgment and statutory adoption are contained in the same Chapter of each of the Code.

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75. Cal. Civ. Code s. 230.
76. Idaho Code Ann. s. 16-1510 (1947).
77. Mont. Rev. Codes Ann. s.61-136 (1947).
78. N. Dakota Century Code s. 14-11-15 (1960).
79. Okla. Stat. Ann. tit. 10 s.55 (1951).
80. S. Dakota Code Ann. s. 14.0408 (1939).
81. Utah Code Ann. s. 78-30-12 (1953).

It is beyond dispute that there are many similarities between the concept of legitimation by acknowledgment as found in these American States and the concept as found in some States in Nigeria. Thus like acknowledgment in the Lagos, the Western, the Mid-Western States and the Maliki law, the effect of acknowledgment is that it produces a complete transmutation from the status of illegitimacy to that of legitimacy from the time of birth of the person thus legitimated. Also like the concept in all the States in Nigeria where it is known, an act of recognition need not be in writing. The American concept is, however, more elastic than the Nigerian concept in some respects. First, as could be observed, nothing in the above provision prevents an illegitimate child who was born during the continuance of his father's monogamous marriage [82] from being legitimated by the father acknowledging its paternity after the dissolution of his marriage. Thus if the case of Cole v. Akinyele [83] were to be decided in any of the seven States listed above, the American State concerned would arrive at a different conclusion as regards the legitimacy of the adulterine child actually born during the continuance of the father's monogamous marriage, since it was found as a matter of fact that "the deceased openly acknowledged the appellants as his children and treated them as such". Whether or not the lawful wife of the deceased objected to legitimation by acknowledgment would seem to be irrelevant in this sort of situation. In the California case of In Re Lund's Estate, [84] which is considered a leading case on the topic in the United States

82. It is beyond dispute that polygamy is not now a feature of the American Family Law.

83. (1960) 5 F.S.C.84.

84. (1945) 26 Cal. 2d 472, 159 P.2d 643.

of America, it was held that acts of acknowledgment "once proclaimed and established they exist as facts for all time and in all places". Thus, since it was found that the deceased acknowledged the paternity of the child after its birth, i.e. during his wife's lifetime, no fresh acts of acknowledgment is required after the death of the wife, assuming that the wife refused her consent during her lifetime. Of course, since the second child's paternity was acknowledged when the deceased was a widower, it automatically follows that an American court will arrive at the same conclusion as that reached by the Federal Supreme Court.

Secondly, a father may, under the provision, legitimate his adulterine child by acknowledging its paternity at any time during which his monogamous marriage subsists, provided his wife consents. Although there is no direct American authority on this point as far as we are aware, it seems that the requirement for the wife's consent is not even as strict as it sounds. Before a wife could consent or refuse her consent to her husband's legitimation of his adulterine child by acknowledgment, she must be aware of the existence of the child. No doubt, admission of paternity of such child by the husband will constitute an admission of adultery, which is a ground of for divorce in all the American States. Under such circumstances, the wife would be faced with the dilemma of whether to petition for divorce on the ground of the husband's adultery or to keep the marriage going with the constant reminder of the husband's past, and presumably continuing, infidelity having been brought to her notice. It is most probable that rather than choosing the latter course, she would, in order to preserve the peace of the family unit, give her consent to legitimation of the adulterine by allowing her husband to recognise its paternity.

And almost certainly, the grant of her consent will be accompanied by a firm threat that the marriage would be dissolved at her instance if the husband persists in his promiscuous relationships.

In this sense, the provision, at one breath balances two competing interests: the interest of the illegitimate child to be legitimated by its putative father and the interest of the father's lawful wife in seeing that her family unit is not disrupted by the husband's injection of an extraneous person into it without her consent. The provision thereby preserves the traditional role of the wife of a monogamous marriage as the only effective check on her husband's promiscuous tendencies but, in the final analysis, does so in a way that will not jeopardise the chances of the child becoming legitimate. Thus, if the wife is generous enough as to give her consent to legitimation of the child by paternal acknowledgment, the husband would be wary as from then onwards to incur the wife's future displeasure by curbing his extra-marital relations or, at least, by ensuring that they do not result in the birth of another illegitimate child. If she refuses her consent and sues for divorce, the child can still be legitimated since his putative father can acknowledge its paternity after the end of his marriage irrespective of the fact that it was an adulterine child. Only in the exceptional cases where the wife withholds her consent and at the same time condones the adultery by the husband could the chances of paternal acknowledgment as a process of legitimation be remote. And it is submitted that having regard to human conduct, such situation is not bound to continue for long.

(b) In some of the American States e.g. Alabama, [85] Iowa, [86] Kansas, [87] Nebraska, [88] Nevada, [89] Maine, [90] and Michigan, [91] the putative father's written acknowledgment is necessary to enable him to legitimate his natural child. In Iowa, Kansas and Nebraska, any written document will suffice. In Nevada, the writing must be before witnesses. In Alabama, the written acknowledgment must be executed before the court or filed with the court. In Maine, such written acknowledgment must be executed before a notary public or justice of the peace while in Michigan it must be executed with the formalities of a deed and in addition be filed with the court. Finally, the effects of legitimation by written acknowledgment in these States are the same as in those where acknowledgment need not be in writing.

(c) In several other States, [92] all that is required to confer legitimacy on an otherwise illegitimate child is a court decree granted upon a petition presented by the father. Of these judicial proceedings, the establishment of legitimacy is not dependent on the consent of the wife if the father is married, and once

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85. Alabama Code tit. 27, s.11 (1940).
86. Iowa Code Ann. s.636.46 (1950).
87. Kansas Gen. Stat. Ann. s.59-501 (1949).
88. Nebraska Rev. Stat. s. 13-109 (1954).
89. Nevada Rev. Stat. s. 134.170(1) (1959).
90. Me. Rev. Stat. Ann. Ch. 170, s.3 (1954).
91. Mich. Stat. Ann. s. 27.3178 (153) (Supp.1957).
92. Alaska Comp. Laws Ann. s. 21-3-2; Indiana Ann. Stat. ss.6-207 (b) (1) (Burns 1953), 44-109 (Burns 1952); Iowa Code Ann. s.636.46 (1950); Kansas Gen. Stat. Ann. s.59-501 (1949); Mississippi Code Ann. s. 1269-01 (1956); North Carolina Gen. Stat. s.49-10 (1950); Ohio Rev. Code Ann. s.2105.18; South Carolina Code s. 15-1384 (1952) Tennessee Code Ann. ss.36-301, -303, -306 (1955); and Wisconsin Stat. Ann. s. 237.06 (Supp.1960).

pronounced legitimate, such child becomes legitimate for all purposes as if born in lawful wedlock.

Finally, at one end of the spectrum, Arizona and Oregon have virtually legislated illegitimacy out of existence. If only for the sweeping nature of the statutory provisions regarding legitimacy in these two States it will be necessary to quote them in extenso.

The Arizona Revised Statute of 1956 [93] provides:

> "Every child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock, except that he is not entitled to the right to dwell or reside with the family of his father, if the father is married.
>
> Every child shall inherit from its natural parents and from their kindred heir, lineal and collateral, in the same manner as children born in lawful wedlock.
>
> This section shall apply although the natural father of such child is married to a woman other than the mother of the child as well as when he is single".

As can be seen, the only limitation placed on the rights of a child who is not born in lawful wedlock is that he is not entitled to reside with his natural father if the father is married to a woman who is not the child's mother.

The Oregon Revised Statute of 1963 employs brevity of provision[94] to achieve a complete equality not only of status but also of rights for all children irrespective of the circumstances of their birth. It says:

> "The legal status and legal relationships and the rights and obligations between a person and his descendants, and between a person and his parents, their descendants and kindred, are the same for all persons, whether or not the parents have been married".

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93. Ariz. Rev. Stat. Ann. s. 14-206.

94. s.109.060.

Even if we disregard the Arizona and the Oregon statutes as falling within a special category next to be touched upon, we shall still discover that the most restrictice provisions of the American law on legitimation by acknowledgment disagree with the philosophy of the Nigerian Federal Supreme Court that an illegitimate child born during the existence of his father's monogamous marriage cannot be legitimated by paternal acknowledgment.[95]

On a wider basis, some Western European and the Latin-American legal systems have accepted, like the Arizona and the Oregon laws, the illegitimate child's claim for equality of treatment before the law as a basic human right. As has been pointed out by Professor Krause, [96] the Scandinavian countries are the first to open the floodgate to new thinking about the problem of illegitimacy in the present Century. Thus, as far back as 1915, a Norwegian Law has placed the illegitimate child on equal footing with a child born in lawful wedlock solely in relation to his mother and father. This statute was, however, repealed by the Law of December 21, 1956 which abolished all the remaining distinctions between legitimate and illegitimate children. Similarly, the Danish Law of May 18, 1960 in regulating the rights of children makes no distinctions between those born in lawful wedlock and those begotten out of it.[97]

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95. For a detailed discussion on the American conception of legitimation by acknowledgment, see C.G. Vernier, American Family Laws, (1931-1938) and Supplement, Vol.IV pp.178-186; and also for a recent work on the topic, J.W. Ester, "Illegitimate Children and Conflict of Laws" in 36 Ind. L.J. (1961) 163.

96. H.D. Krause, "Bastards Broad - Foreign Approaches to Illegitimacy" in 15 Am. J. Comp. Lt. (1967) 726 at p.727.

97. cited from Krause, Ibid.

The Latin-American countries have recently decided to make the matter of legitimacy a constitutional law matter. They each have in their respective Constitutions, a provision which abolishes the legal inequalities between illegitimate and legitimate children. For example, article 183 of the Bolivian Constitution [98] provides that "inequalities among children are not recognised; they all have the same rights and duties". In similar vein is article 86(2) of the Constitution of Guatemala which provides that "all children are equal before the law and have identical rights" and that the "law shall establish the means of proof of investigating paternity".[99] Both the Panama's Constitution[1] and the Constitution of Uruguay[2] have an almost identical provision stating that parents have the same duties towards children born in lawful wedlock and those born out of it, with an addition by the Panama's Constitution that "all children are equal before the law and have the same hereditary rights in intestate succession".

This trend towards conferment of legitimate status on all children regardless of whether they were born in or out of lawful wedlock is not limited to the Western European countries. Many Eastern European countries, viz., Albania, Bulgaria,

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98. Pan-American Union, Constitution of the Republic of Bolivia, 1961.
99. Pan-American Union, Constitution of the Republic of Guatemala, 1965.
1. Pan-American Union, Constitution of the Republic of Panama, 1946, Art.58.
2. Pan-American Union, Constitution of the Republic of Uruguay, 1967, Art.42.

Czechoslovakia, East Germany, Hungary, Poland, Rumania and Yugoslavia, have Constitutional or statutory provisions which "grant equal or near equal rights to the child born out of lawful wedlock" as one born in it.[3]

Lastly, but most importantly for the Nigerian law, the English law, assuming that Nigerian judges have no alternative but to follow its lead, has come a long way since the ancient days of filius nullius. We have seen that legitimation by subsequent marriage was accepted in England in 1926 subject to the express provision that an illegitimate child born during the period of a monogamous marriage by one or both of its parents could not be legitimated. Despite the recommendation of the Royal Commission on Marriage and Divorce[4] that the status quo should be maintained, the stigma imposed on adulterine child whose parents subsequently inter-married was removed by the Legitimacy Act, 1959.[5] Exactly ten years after the 1959 Act, a remarkable development has taken place in the English law, either in response to or despite repeated suggestions by academic writers [6] that the principle of acknowledgment might be accepted in England as a partial remedy to the problem of illegitimate children whose number is on the increase from year to year.

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3. Krause, op.cit., p.728 and the authorities cited by him at fn.21.

4. Cmd.9678 (1955), para.11 where it was stated:

> "So long as marriage is held to be the voluntary union for life of one man with one woman, that conception is wholly incompatible with the provision that one or other of the parties can during the subsistence of the marriage, beget by some other person children who may later be legitimated".

5. as from October 29, 1959. See s. 1 (2).

6. See e.g. Lasok, 10 I.C.L.Q. (1961) 123, 17 I.C.L.Q. (1968) 634; Stone, 15 I.C.L.Q. (1966) 505.

To begin with, the United Kingdom Government, recognising that the law of succession seemed to be the main, if not the only, field in which illegitimate children are still discriminated against in England and, moreover that such discrimination is no longer compatible with the changed attitude of the English society towards illegitimacy, appointed in 1964 a Committee, the Russell Committee on the Law of Succession in Relation to Illegitimate Persons, to consider what changes are desirable in the law. The Committee reported on May 12, 1966.[7] Permeating the whole recommendations of the Committee is the idea that morals are, at best a poor ground for deciding what the rights of children born out of wedlock should be. In the words of the Report

> "no child is created of its own volition. Whatever may be said of the parents, the bastard is innocent of any wrongdoing. To allot to him an inferior, or indeed unrecognised, status in succession is to punish him for a wrong of which he was not guilty." [8]

Proceedings from this basis, the Committee considered a number of civil law solutions, including the concept of acknowledgment,[9] but rejected such expedients in favour of a wider view that

(a) an illegitimate child, or his issue, should have the right to share on his mother's or father's intestacy on the basis of equality with a child born in wedlock. (Paras. 31, 32, 33 and 46)

(b) the parents of an illegitimate child should be able to share on his intestacy as if he were a legitimate child. (Paras. 46 and 47)

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7. Cmnd. 3051 of 1966.
8. Ibid., Para.19.
9. Ibid. Paras. 39 and 42.

(c) an illegitimate child should have the same right as a legitimate child to apply for a share in the estate of either parent under the English Inheritance (Family Provisions) Act, 1938. (Paras. 26 and 46)

(d) for the above purposes, there should be no distinction between adulterine, incestous and other illegitimate children. (Para.56)

(e) but that the rule of construction of phrases such as "children" or "issue" occuring in wills or in other instruments should, prima facie, be limited to legitimate relationships as in the existing law.

All the above proposals, except the last, were adopted by the British Parliament and passed as Part II of the Family Law Reform Act 1969.[10] Consequently all enactments affected by these proposals were amended accordingly.[11] As regards the construction of such words as "child" or "issue" in wills, codicils, dispositions inter vivos and statutory enactments, it is provided that where such words occur, they should be construed with reference to legitimate and illegitimate children, unless in the case if wills, codicils and dispositions inter vivos, a contrary intention is clearly expressed. The only limitation placed by the Act on the rights of inheritance of an illegitimate child on an equal footing with a legitimate child is that he cannot take as an heir in a property or interest which develves with a dignity or title of honour or with an entailed interest.[12] Also, since the Act is not

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10. ss.14-19.

11. viz., The A.E.A., 1925; The Legitimacy Act, 1959; The Wills Act, 1837 and The Trustee Act, 1925.

12. Family Law Reform Act 1969, ss. 14 (5), 15 (2) and (5).

retroactive, the provisions of the Act giving an illegitimate child equal rights of inheritance as a child born in lawful wedlock are all limited to wills, codicils and dispositions inter vivos coming into effect after the commencement of the Act.[13]

Shortly after the Report of the English Committee on the Law of Succession in Relation to Illegitimate Children, the Sub-Commission on Prevention of Discrimination and Protection of Minorities - a Sub-Commission of the United Nations Commission on Human Rights - presented on January 13, 1967, the text of its proposal concerning Discrimination Against Persons Born Out of Wedlock.[14] The Sub-Commission observes that a great proportion of the human race is composed of persons born out of wedlock and that many of them, because of the promiscuous nature of the relationships leading to their birth, are victims of legal or social discriminations in most systems of law in the world. It considers such legal disabilities as violations of the principles of equality and non-discrimination set out in the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Convention on the elimination of all forms of Discrimination and the International Convention on Human Rights. It therefore adopted some "General Principles of Equality and Non-Discrimination in Respect of Persons Born out of Wedlock" to be followed by all its members. The gist of the

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13. 1st January, 1970.

14. Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, United Nations Economic and Social Council, Study of Discrimination Against Persons Born out of Wedlock: General Principles on Equality and Non-Discrimination in Respect of Person Born out of Wedlock, UN. Doc. E/CN.4 Sub.2/L.453 of January 13, 1967.

whole "General Principles" is contained in section 7 which provides that "every person, once his filiation has been established, shall have the same legal status as a person born in wedlock". The other sections which can be seen in the appendix [15] to this work contains detailed rules for ascertaining the paternity of a person.

The glances already taken at other legal systems of the world show that there is no novelty in the General Principles adopted by the United Nations Sub-Committee that equal treatment should be given to persons born in or out of wedlock. Rather, they appear nothing more than approbation of the social utility of most municipal laws on legitimacy, be it customary or otherwise, which have successfully disassociated the moral abhorence to parental sin from the social protection to which all children are entitled.

It will be noticed that all the various legal systems so far considered in our comparative survey, or the majority of which the United Nations Sub-Commission had in contemplation in formulating its General Principles, are countries in which the only form of marriage permitted is the monogamous one. If these countries see nothing wrong in conferring legitimacy on an adulterine child begotten during the existence of the monogamous marriage by one or both the parents to a third party, or in giving such child rights of inheritance as if he were born in lawful wedlock, there would seem to be no sociological or moral justification in a polygamous country like Nigeria for placing any bar on legitimation of such child by acknowledgment. Therefore, for the Federal Supreme Court

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15. See App.4.

or any other court in Nigeria to persist in the view that public policy demands such a limitation becomes an insular approach out of tune with the world's modern thought and certainly contrary to the declaration of the United Nations Sub-Commission of which Nigeria is a member. Moreover, the suggestion that the stigma of bastardy, coupled with its legal disabilities, would curb promiscuous relations in Nigeria appears to us not convincing. As the above cases show, it has not worked in the country. Besides, apart from the greater immorality in penalising an innocent child for a guilt to which he was not a party, we must accept the logicality of the statement of an American judge[16] in extolling the virtues of legitimation by acknowledgment that

> "The complete freedom from legal responsibility for illegitimate children which the law afforded the father, may have been a doctrine which to the male in licentious moments was more encouraging than deterrent, and were better abandoned".

In other words, the more the law allows the father of an illegitimate child to assume voluntary responsibilities towards the child, the less will be the inclination of such father to have more illegitimate children. Finally, the adoption of this approach in Nigeria will mean that hard-pressed unmarried mothers would be greatly relieved of sole responsibilities for their illegitimate children since there are no social institutions in Nigeria providing (as in other more economically developed countries) for the welfare of illegitimate children to which such women could jettison their children.

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16. In Re Lund's Estate (1945), 26 Cal. 2d 472; 159 Pac.(2d) 643.

6. SUMMARY OF REFORM PROPOSALS.

There is no doubt that the Nigerian law regarding legitimacy, fragmentary as it is, is quite inadequate and calls for reform. It is considered that any reform proposals, if it is to be of any fundamental value, must embrace the whole of the problem in the field of the general law and customary law, since there are no "different grades of legitimacy" in Nigeria. In short, the urgent need is for an integration of the rules for determining legitimacy as presently existing in a two-fold form in each of the States. And in doing this, advantage should be taken of the present chaotic situation to produce, through the efforts of a much needed National Commission for the Unification of Legislations in Nigeria, a uniform law on legitimacy throughout the federation on the following lines.

To begin with, if we accept the postulate that legitimacy should be predicated upon the innocence of the children and upon the pointlessness of penalising them for the fault of their parents, then the ideal solution would be for a short Edict to be promulgated by each of the States' legislators providing that all children, whether born within or outside monogamous or polygamous marriages, are legitimate. Under such Edict, the only act that would be necessary to make a child legitimate in relation to his natural parents and their collaterals would be the fact of birth itself. And to establish this fact, the Edict will contain comprehensive rules and presumptions for establishing paternal filiation. Such rules should contain no restrictions on spouses as to the nature of evidence that may be given to disprove paternity of a child presumed to be their legitimate issue.[17] And in difficult cases,

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17. For the present position of the law on this point, see the Postscript.

the courts should have power to order blood tests to determine paternity. The adoption of this approach would have brought Nigerian law on legitimacy into line with the progressive systems of law in the world, in addition to making it conform to the recommendations of the United Nations Sub-Commission.

Alternatively, the two methods of legitimation may be widened in scope as follows:

1. Statutory Legitimacy, i.e. legitimation by subsequent marriage, should be extended in scope to allow a subsequent polygamous marriage of a man and a woman to legitimate their illegitimate child or children. Whether or not such child was begotten in adulterous relationship which took place during the continuance of a monogamous marriage between the man or woman to a third person should be immaterial. The existing law which allows legitimation only by subsequent monogamous marriage is deficient in failing to take into account the fact that there is a dualistic system of law on marriage in Nigeria and consequently, that a person who was previously married under monogamy may, after dissolution of such marriage, enter into a valid polygamous marriage.

Secondly, owing to the existence of the principle of legitimation by paternal acknowledgment in certain States of Nigeria, it may be wondered why legitimation by subsequent marriage in these States should not have retrospective effect from the date of birth of the child rather than taking effect from the date of the parents' inter-marriage or the commencement of the Law, whichever is the case. Otherwise, the co-existence of legitimation by paternal acknowledgment with legitimation by subsequent marriage will mean that the former method, with its retroactive effect, will render superfluous the latter mode, since it will be more advantageous for a person

subject to the law of any of these States to establish his legitimacy by proof of his paternal acknowledgment rather than by proof of the subsequent marriage of his parents. For instance, it has been accepted as a matter of course in all the American States where legitimation by paternal acknowledgment is permitted that these two methods for legitimation are complementary and not mutually exclusive. Hence legitimation by acknowledgment as well as legitimation by subsequent marriage dates from birth. Illustrative of this point is the Wisconsin statute. (The part dealing with legitimation by acknowledgment has been noted above.) A complementary provision on legitimation by subsequent marriage provides that

> "In any and every case where the father and mother of an illegitimate child or children shall lawfully intermarry ... such child or children shall thereby become legitimated and enjoy all the rights and priviledges of legitimacy as if they had been born during the wedlock of their parents".[18]

Similar trends have been projected even in countries where there are no legitimation by paternal acknowledgment. For example, following the recommendations of the Commissioners on Uniformity of Legislation in Canada, the Canadian Provinces have each enacted new statute providing that the legitimacy of a person legitimated by the subsequent marriage of his parents should date from the time of his birth. Representative of the Canadian statutes on this point is the Legitimacy Act of Saskatchewan,[19] section 2(1) of which provides:

> "Where before or after the coming into force of this section and after the birth of a person his parents have intermarried or intermarry, he is legitimated from birth for all purposes of the law of Saskatchewan".

The position is the same in Australia as a result of the Australian Marriage Act of 1961.[20] And finally, almost the same

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18. Wis. Stat. Ann. s. 245.36 (1957).
19. Cap.343, Revised Statutes of Saskatchewan, 1965.
20. s.89.

result has been achieved in England by virtue of the Family Law Reform Act 1969. Section 15 (4) (b) of the Act amends section 3 (2) of the English Legitimacy Act, 1926 to the effect that where the right to any property depends on the relative seniority of the children of a person. a child legitimated under the Legitimacy Act 1926 should rank, in relation to any right conferred by a disposition made after 1st January, 1970, as if he had been born legitimate, unless a contrary intention is shown by the terms of such disposition.

2. The principle of acknowledgment under the Maliki law is unduly restrictive in refusing the principle to be used as a means of conferring legitimate status on a person whose parents were incapable of inter-marriage at the time of his birth. If this is a rule of public policy of the Maliki law, it is submitted that it has become outmoded since it is based on the now discredited theory of penalising the innocent child for a wrong committed by his parents. In any event, the effect of this rule has been somewhat neutralised by the Northern Nigeria Legitimacy Law, a statute which operates in all the six Northern Nigerian States. Thus, a father who cannot legitimate his adulterine child by acknowledgment according to the Maliki law because he could not marry the child's mother at the time of its birth, may nonetheless legitimate such child by marrying the mother in a monogamous form.

In the Lagos, the Western and the Mid-Western States, it is considered that the principle of acknowledgment should be allowed to operate with full regard to popular consciousness. The employment by the Federal Supreme Court and the respective High Courts of the concept of public policy to bastardise adulterine children who had been validly acknowledged under customary law is certainly artificial and uncalled for.

As has been pointed out by Savage v. Macfoy,[21] at the root of the principle of paternal acknowledgment is the "predominant" fact that it is the interests of the illegitimate children and not the circumstances of their birth that should be regarded. Therefore, of gratifying interest to the Nigerian judges and legislatures should be the fact that this same factor, i.e. the welfare and interests of the children, is instrumental to the change for the better of the hitherto unfavourable attitude towards illegitimate children in most legal systems in the Western civilization. Under such circumstances, it has become unnecessary for the Nigerian law on legitimacy to conform to a supposed universal concept which discourages promiscuity by bastardising the offsprings of such relationship. Rather, the philosophy of the indigenous law which all systems of law are now trying to adopt, should be fully projected.

Like the rest of the federation, there is no statute preserving the legitimacy of children who are born in void monogamous or polygamous marriages of their parents in the Eastern Nigerian States. Neither is there any enactment which legitimatizes the issues of voidable monogamous marriages which were subsequently annulled.[22] But unlike the rest of the federation, none of the three Eastern Nigerian States upholds the principle of paternal acknowledgment as a mode of conferring the status of legitimacy on an otherwise illegitimate child. The result is that the incidents of illegitimacy must be great in these jurisdictions especially in view of the last civil war. This is, however, partially remedied by the Eastern Nigerian Adoption Law of 1965 under which full degree of legitimacy may be reached

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21. (1909) 1 Ren. G.C.Rep.504.

22. See now the Postscript for the position of the law on this point.

if the natural parent of an illegitimate child adopts him. But like all cases of statutory adoption, the judicial process for achieving this is not only cumbrous but expensive. May we therefore suggest that the concept of legitimation by paternal acknowledgment offers a better and inexpensive process of conferring rights and priviledges on illegitimate children in these States, as in other States of the federation. It will preserve the legitimacy of children of void and voidable marriages, and in addition, allow legitimation where there is no form of marriage between the parents of an illegitimate child.

CHAPTER SIX

LEGITIMACY IN THE CONFLICT OF LAWS.

A. PRELIMINARY OBSERVATIONS.

1. In almost all systems of law the rights of a mother towards her natural child, or that of such child towards its mother, depend on the physical fact of birth. Though this type of mother and child relationship is generally considered illegitimate, in so far as their mutual duties and rights are concerned, problems of private international law are invariably avoided. But as regards the legal rights and duties of the father towards his natural child, or vice versa, different considerations are involved. To determine legal fatherhood and hence legitimacy is not susceptible to a universal solution in all legal systems as the above comparative treatment of the Nigerian law on legitimacy has revealed. In most systems of law, birth of a person in an antecedent marriage, whether lawful or invalid, between his parents is demanded as the prerequisite for his legitimacy. In most others, the subsequent marriage of the parents of an illegitimate child is an additional criterion. While in few others, mere acknowledgment or recognition of paternity by the putative father is sufficient. Finally, in some countries, as the modern tendency has revealed, the fact that a person is the natural father of the child is adequate to determine the legitimacy of such a child. Since the situation in which legitimate relations arise between a child and its parents are not the same all the world over, problems of what municipal law determines the legitimacy of a person are bound

to arise when such person has had contact with more than one system of law before the question of his legitimacy arises. The role of private international law in this sort of situation is to indicate which particular municipal system should determine the legitimacy of such a person.

With the existence of several legal districts under the federal umbrella in Nigeria, conflicts between divergent laws on legitimacy not only looms in theory but exists in practice. Except for birth in monogamous marriage and legitimation arising from the performance of such marriage subsequently after the birth of a child, no other modes of determining legitimacy has an identity of rules within the Federation. In so far as the position remains the same, any discussion on Nigerian private international law of legitimacy must proceed on the basis that the choice of law determinants provided for ascertaining the legitimacy of a person at the international plane cannot be radically different at the inter-state level. The suggestion made above that the law on legitimacy should be unified within the federation is with a view to eliminating conflicts in this sphere.

2. A point which has been assumed throughout the preceeding Chapter and which touches on the choice of law problem is that in Nigeria, legitimacy is a subject within the exclusive legislative competence of the State, and not the Federal, Government. Under all systems of private international law, the approach to legitimacy is to treat it as a matter concerning the status of the de cujus, and therefore to be governed by the relevant personal law as in all other matters of status. We have noticed that this personal law is ascertained in the common law systems by reference to the law of the country or the legal district where a person has his domicile. And that with regard

to a federation or a political affiliation, the orthodox view is that domicile should be fixed within a territorial unit under a single system of law, e.g. a State of the federation, and not within the federation or the political affiliation as a whole. We have also seen in previous Chapters that this view has been modified in certain countries to the extent that where, in a Federation, a certain matter, e.g. divorce or legitimacy, is within the exclusive legislative list of the Federal Government, a federal law may stipulate that a national domicile, as opposed to a State domicile, should be found for purpose of jurisdiction or for choice of law, as the case may be. In Nigeria, just as it has been suggested that a national domicile should be found as basis of jurisdiction for divorce of monogamous marriages, so also has it been claimed that domicile for purpose of choice of law in relation to legitimacy should be located in the Federation as a whole. The problem here contemplated is whether legitimacy arising from birth in lawful monogamous marriage or the result of a subsequent marriage is a matter within the exclusive legislative competence of the Federal Government so as to justify the Nigerian courts' finding that a national domicile has been created for the purpose of the choice of which law determines the status of legitimacy.

Legitimacy is not specifically mentioned in this list of topics allocated to the Federal or the State Government in the Constitution. The nearest approach made by the Federal Constitution to this problem is that it includes, in the list of matters within the legislative competence of the Federal Parliament,

> "Marriages other than marriages under Moslem law or other customary law; annulment and dissolution of, and other matrimonial causes relating to, marriages other than marriages

> under Moslem law or other customary law". [1]

In short, what the provision attempts to express in so many words is that only the Federal Parliament can enact laws on monogamous marriages and matrimonial causes in relation thereto. In addition, the Constitution further provides that the legislative competence of the Federal Parliament on the above matters includes "any matter that is incidental or supplementary" to them.[2] The question arising for consideration, therefore, is whether legitimacy is inseparably linked with marriage in Nigeria that the former should be considered an incidental matter to marriage, thereby justifying legitimacy being considered as falling within the legislative competence of the Federal Parliament.

The solution offered on this point by judicial pronouncements are divergent. The first case to consider the issue is that of the Northern Nigeria High Court. In Okonkwo v. Eze,[3] Hurley, C.J., stated, obiter, as follows:

> Legitimacy is not a subject within the exclusive legislative competence of the Federal legislature. In regard to it, the States may legislate independently of the Federation and of one another, and may legislate variously. Each State, in relation to legitimacy, is a territory subject to a separate system of law. Each State is a unit, to the exclusion of the other States and the Federation, for the purpose of domicile where domicile comes in question in relation to legitimacy. The person whose domicile is material in any dispute concerning legitimacy will necessarily have a domicile in one of the States, not in Nigeria as a whole.

Almost simultaneously with the expression of the above view was the adoption by the Federal Supreme Court in Cole v. Akinyele [4]

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1. Federal Republican Constitution of Nigeria, 1963, Schedule Part I, Item 23.
2. Ibid., Item 45.
3. (1960) N.N.L.R.80, at pp.81-82.
4. (1960) 5 F.S.C.84.

of the opinion of the Privy Council[5] that "it is a possible jural conception that a child may be legitimate though its parents were not and could not be legitimately married". With the above strong dicta, one could have been justified in stating that it is now beyond doubt in the domestic law that marriage and legitimacy are not correlative matters and that power to enact laws on one does not imply power to bring forth legislation on the other.

But contrary to this view is that expressed by Adefarasin, J., in the Lagos case of Odunjo v. Odunjo[6] that legitimacy is by the Constitution of the Federal Republic within the exclusivelegislative competence of the Federal legislature and that with respect to it there should be one Nigerian domicile. The two legal writers who have so far commented on the point appear confused. Thus, in the earlier part of their work,[7] Messrs. Kasunmu and Salacuse were quite emphatic that legitimacy, even when it arises out of monogamous marriage, is a subject "upon which only the [States'] legislatures may act". Yet at the same breath, they later maintained that the two Federal acts which impelled the High Courts to exercise their jurisdiction in divorce and other matrimonial causes in accordance with English law also impelled them to apply English law on legitimacy because "legitimacy in respect of void and voidable marriages is incidental to the question of annulment of a statutory marriage"![8]

It must be pointed out, however, that the view of Adefarasin, J., that legitimacy is a federal matter because it is incidental to marriage and that domicile in respect of

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5. in Khoo Hooi Leong v. Khoo Kean Kwee [1926] A.C.529 at p.543, cited with approval in Bamgbose v. Daniel [1955] A.C.107.
6. (1964) L.L.R. 43 at p.47.
7. Kasunmu and Salacuse, op.cit., p.5.
8. Ibid., at p.211.

legitimacy emanating from monogamous marriages should be fixed in the federation as a whole, has some measure of support in Australia. The Australian Constitution, like the Nigerian Constitution, allocates certain matters within the exclusive legislative competence of the Federal Parliament, while the rest are reserved for the state's legislature. The Federal list includes "marriage" and "matrimonial causes". Also, like the Nigerian Constitution, section 51 (xxxix) of the Australian Constitution provides that the Commonwealth Parliament has power to enact laws on any matters which are incidental or supplementary to the topics enumerated in the federal legislative list. In 1961, the Commonwealth Parliament enacted a Marriage Act, sections 89 to 93 of which deal with legitimacy of children of valid and invalid marriages. The State of Victoria brought an action challenging the powers of the Commonwealth Parliament to include provisions on legitimacy in the Marriage Act. The question that arose for determination in Attorney-General for the State of Victoria v. The Commonwealth of Australia, [9] therefore, was whether legitimacy is a matter incidental to marriage and therefore within the exclusive legislative competence of the Australian Federal Parliament under section 51 (xxxix) of the Constitution. As regards this, the High Court for Australia decided that it was, and that the Commonwealth Parliament had validly exercised its Constitutional powers by enacting laws on legitimacy.

Despite the apparent similarity between the Nigerian and the Australian Constitutional provisions on this point, it is submitted that the Nigerian Constitution must be interpreted differently in view of the differences between the criteria for determining legitimacy in the two countries. In the Australian

9. [1961] 107 C.L.R. 529.

domestic law, a monogamous marriage, which is within the legislative competence of the Commonwealth Parliament, is the only vehicle through which legitimacy may be established. In other words, before a person can be considered legitimate his birth must have occured in a valid or invalid monogamous marriage, or if born out of lawful or ostensible wedlock, he must have been legitimated by a subsequent monogamous marriage of his parents. In Nigeria, apart from birth in an antecedent monogamous marriage and legitimation by a subsequent monogamous marriage, there are other modes of determining legitimacy. These, as we have seen, are (i) birth in lawful polygamous marriage and (ii) acknowledgment of paternity by the putative father even when there is no form of marriage between the natural parents of the child concerned. These last two modes of establishing legitimacy are concepts of customary law and customary law, in all its ramifications, is a subject within the exclusive legislative competence of the state Government. Therefore, even if we disregard the fact, as Adefarasin J., has done, that legitimation by paternal acknowledgment is incompatible with the view that legitimacy is incidental to marriage, we shall still be led to the following anomalous situation: that is to say, the Federal Government would be the competent body to enact law on legitimacy when it arises out of an antecedent or a subsequent monogamous marriage, while the states will retain their constitutional powers to regulate the law on legitimacy which emanates from a polygamous marriage or from paternal acknowledgment. Therefore, being a federal subject, a national domicile should be found when the issue is the legitimacy of a person whose parents had contracted an antecedent or subsequent monogamous marriage, whereas a state domicile should

be demanded when the criterion for acquiring legitimate status is a polygamous marriage or paternal acknowledgment. In our view, the complexity in the domestic law on legitimacy is a sufficient problem for intellectual groping. Further confusion should not be created by the introduction of the concept of "divisible legitimacy" and hence a two-dimensional concept of domicile to regulate it. If only on this ground, it is submitted that domicile for the purpose of determining the law of which legal unit within the federation determines the legitimacy of a person must be located in a state.

Secondly, the view that legitimacy, whether arising from a monogamous or polygamous marriage, or when not dependent on any form of marriage at all, is a state subject, necessitating the finding of a state domicile for purposes of choice of the applicable law, has been the basis of the various Legitimacy Laws of the States.[10] Having been considered as validly enacted by competent authorities for about fifteen years, the validity of the statutes should not be disturbed on the footing that the States have no powers under the Constitution to enact them, since such a vew will not be conferring advantages but creating confusion and difficulties.

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10. See e.g. s. 3 of the Western Nigeria Legitimacy Law, Cap.62, which provides that "where the parents of an illegitimate person marry or have married one another [monogamously], ... the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in the State render that person, if living, legitimate". A similar section of the Lagos Legitimacy Act employs the words "domiciled in Nigeria". However, it has been clearly shown that "domiciled in Nigeria" was left in the statute as a result of the draftsman's error and that "domiciled in Lagos" is intended. See Machi v. Machi (1960) L.L.R. 103 at p.108.

Finally, the view that legitimacy is incidental or supplementary to marriage is incompatible with legitimation by acknowledgment of paternity by the putative father. For one of the indisputable rules of this mode of acquiring legitimate status is that it is irrelevant if the parents of the legitimated child did not undergo any form of marriage ceremony.

3. The last observation preliminary to a discussion on the choice of law concerns the difference of approach in the treatment of the incidents arising from the status of legitimacy in the Nigerian law and at English common law. Since the formative period of the English common law rules of private international law, it has been accepted that the rules for determining legitimate birth is different in character from that which determines legitimacy arising as a result of a subsequent marriage or through acknowledgment of paternity by the putative father. The reason for this is not far fetched. As we have pointed out above, only children born in lawful wedlock are treated in England as legitimate for all purposes. In so far as the enforcement of the incidents of the status of legitimacy is concerned, the status arising from legitimation by subsequent marriage or legitimation by paternal acknowledgment is inferior to that arising from legitimate birth. For example, a child legitimated by the subsequent marriage of its parents or by acknowledgment by the putative father under a foreign law[11] cannot succeed as heir to any property or interest which devolves with a dignity or title of honour. In Nigeria, however, legitimation by subsequent marriage or legitimation by paternal acknowledgment confers the same rights on a child thus legitimated

11. Legitimation by acknowledgment is unknown to English domestic law.

as if he had been born in lawful wedlock. In this respect, it is noteworthy to observe that the limitation placed on the succession rights of a person legitimated by subsequent marriage by section 3(3) of the English Legitimacy Act, 1926 was considered meaningless in the Nigerian context and hence ommitted from the provisions of the Nigerian Legitimacy Act of 1929 which, as we have stated, was almost a carbon copy of the English Act of 1926.

Finally, in view of the equal treatment of the incidents pertaining to legitimacy, whether by birth in wedlock or through legitimation by some subsequent act of the parents, in the Nigerian law, the only justification for considering the law governing legitimacy which arises from birth in wedlock separately from that which is the result of subsequent marriage or paternal acknowledgment is because of the time element involved in the choice of the applicable domiciliary law.

B. BIRTH IN LAWFUL OR OSTENSIBLE WEDLOCK.

It has been pointed out that legitimacy is a status to be governed by the law relevant for determining such matters of domestic status viz. the law of domicile. However, the status of legitimacy being derivative from the acts of the child's parents, the applicable law may only be predicated on the domicile of the parents. Hence a lot of problems bedevil the private international law rules governing legitimacy which arises through birth in wedlock. At what time should reference be made to the lex domicilii of the parents since this may change from time to time? If the parents are, or were, domiciled at the relevant time in different countries, which lex domicilii is to prevail or are the two leges domicilii to be applied cumulatively?

Is the validity of the parents' marriage a necessary condition to the child's legitimacy? These are the questions which we shall attempt to answer for the Nigerian law in this section, starting first, for convenience, with the last question.

Before the rather unorthodox decision of Romer J., in the English case of Re Bischoffsheim: Cassel v. Grant, [12] the attitude of the common law judges was that the issue of the legitimacy of a person should be predicated on the validity of the marriage between his parents.[13] Therefore, when both or one of the parents lacks capacity to marry each other according to the rules of English private international law, the marriage between the parties is not only void but any child born of such marriage is illegitimate. This attitude seems hardly surprising in that in the formative period of the English private international law, the only mode of attaining legitimacy known to the English domestic law was birth in lawful wedlock. Legitimatio per subsequens matrimonium was a latter addition and legitimation by paternal acknowledgment has never been known. Therefore, the rule of the English private international law that the legitimacy of a person depends on the validity of his parents' marriage is merely a reflection of the domestic notion of legitimacy.[14] But as contact with other legal systems increased, the question becomes pressing as to what is the status of children born in foreign countries where their parents were domiciled and where the marriage between them was regarded as lawful, even though such marriage was invalid according to English conflicts rules.

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12. [1948] Ch.79.

13. Shaw v. Gould (1868) L.R. 3 H.L. 55; Re Bethell (1887) 38 Ch. D. 220; Brook v. Brook (1861) 9 H.L.C.193; De Wilton v. Montefiore [1900] 2 Ch.481.

14. Compare Kurt Lipstein, in Festschrift Vol.1 (ed. by Ernst Rabel) (1954) 611 at pp.612 and 621 et. seq.

Such a situation re-occurred in Re Bischoffsheim [15] where Romer, J., made a clean break with prior authority by holding that a person's legitimacy and a valid marriage between his parents are not correlative factors and that the legitimacy of a person may be established without making the validity of his parents' marriage its concomitant prerequisite. The facts of the case were that in 1917, an Englishwoman, Nesta, married a domiciled English man, Lord Richard Wellesley. Two children were born of this marriage before Lord Richard was killed in action in 1917. Three years later, his widow re-married in New York, one George Wellesley, the brother of her deceased first husband. At that time, the marriage of a widow to her deceased husband's brother was invalid by English law although the New York law saw nothing wrong in such a legal relationship. In 1920, a son Richard was born of this second marriage. Meanwhile, an English testator had given a share of residue to his granddaughter, Nesta, for her life with remainder to her children. The question to be answered by the court was whether Richard could take under the will as one of the children of Nesta.

After reviewing all prior English authorities on the subject of legitimacy, Romer, J., found it unncessary to decide whether Nesta and George were domiciled in England in 1917, the date of the second marriage and hence whether their marriage was void according to English law. He was satisfied that by the time Richard was born in 1920, both his parents had established a domicile of choice in New York and that according to the New York law Richard was legitimate. He therefore held that since the status of legitimacy was conferred on Richard by the law of his domicile of origin, "i.e. the domicile of his parents at his birth", such status should be recognised in England. Even

15. [1948] Ch.79.

assuming that the parents were domiciled in England at the time of the mother's second marriage, with the result that the marriage was void, he was of the opinion that the invalidity of the marriage should not affect the status of legitimacy conferred on Richard by the law of his domicile of origin.

The decision has been the subject of comments by private international lawyers in the common law world. [16] Some of these comments are favourable [17] while those that are critical [18] are based on the ground that Romer, J., refused to follow prior common law authorities and not that his decision is a bad law. However, Romer J.'s decision in Re Bischoffsheim [19] is instrumental to the decision of the Privy Council in Bamgbose v. Daniel,[20] the most important single Nigerian case dealing with legitimacy in the conflict of laws. The facts in the case were as follows: H. and W., domiciled in Nigeria, contracted in 1884 a monogamous marriage under the Marriage Ordinance. Section 41 of the Ordinance (now section 36 of the Marriage Act) provides that when any person, subject to customary law, had married in accordance with the provisions of the Act, i.e. monogamously, then on the death intestate of such a person, or on the intestacy of his issue, the intestate estate should be distributed according to the law in England relating to the distribution of personal estates of intestates, any rule of Nigerian customary law to the contrary notwithstanding. X. and Y.

16. See notes 17 and 18 below.

17. Cheshire, op.cit. 7th ed. pp.365-366; Graveson, op.cit., 6th ed p.386; Wolff, op.cit., p.388; Kurt Lipstein in Festschrift, Vol.1 (ed. Ernst Rabel, 1954) p.611 et seq.; B.D. Inglis, 6 I.C.L.Q. (1957) 202 at p.219.

18. J.H.C. Morris, in 12 Conveyancer (N.S.) 223; Dicey and Morris, op.cit., 8th ed. pp.422-425; F.A.Mann, 64 L.Q.R. 199; Falconbridge, Conflict of Laws (2nd ed.) pp.747-751 and 761-769.

19. [1948] Ch.79.

20. [1955] A.C.107.

were the legitimate children of H. and W. X., the elder brother, became legitimate by the subsequent marriage of his parents while Y. was the issue of the marriage. X., following the footsteps of his parents, married monogamously and had one son, namely, Bamgbose, the appellant. Y. on the other hand, contracted nine polygamous marriages of which twelve children, the respondents, were born. On the intestacy of Y., Bamgbose claimed to be entitled to succeed to the intestate estate of his uncle in default of any legitimate children surviving him. The twelve children of Y's polygamous mrriages, he contended, were illegitimate by the law of England which governed the distribution of the estate. To put it in another way, the appellant argued that the only course open to the court was to classify the question, who were entitled to succeed on the intestacy of Y., as one of construction and therefore to be governed by English domestic law, the lex successionis, with the result that since polygamy is unlawful according to that law, the children of such marriages are illegitimates. Therefore, of prior consideration to the question whether the children should be accorded, as against the appellant, right of succession in their deceased father's estate, is the issue of their legitimacy and by which law it should be determined.

As regards these points, the Privy Council gave the following answers. First, as a matter of statutory construction, the court was of the opinion that there was nothing in section 41 of the Nigerian Marriage Ordinance which compelled the courts to determine the question of the legitimate or illegitimate status of the twelve children by reference to English law. What the section demanded was that the distribution of the deceased estate should be made according to the law relating to intestate succession in England, leaving it to the appropriate law governing

matters of domestic status to determine whether rights of succession are attributes of such status.

Secondly, their lordships found that the universal principle governing the legitimacy of a person in a conflictual situation is that such matter of status is to be determined by the law of the person's domicile of origin. In support, they quoted, among others, the decision of Kindersley, V.C., in Re Don's Estate[21] to the effect that:

> "The legitimacy or illegitimacy of any individual is to be determined by the law of that country which is the country of his origin. If he is legitimate in his own country, then all other civilized countries .....recognise him as legitimate everywhere".[22]

They found that all the circumstances concurred to fix Nigeria as the domicile of the parents of the children at the time of their births. And that since they were considered legitimate by their common lex domicilii at the relevant times, their status and the attributes should be recognised for purposes of inheritance under English law. In this respect, the fact that they were issues of polygamous marriages was considered of no moment by the Privy Council who was of the view that the private international law rule enunciated in the cases cited before it, though strictly in relation to birth in monogamous marriages, was of equal applicability to a status alleged to have arisen as a result of birth in a polygamous marriage.

Thirdly, with regard to the contention of the counsel for the appellant that the validity of the children's parents' marriages was inseparably linked with their legitimacy, the court held that the initial validity or invalidity of the marriages of the children's parents should not be considered,

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21. (1857) 4 Drew 194.

22. (1857) 4 Drew 194 at 197. See also the similar judgment of Cotton L.J. in Re Goodman's Trusts (1881) 17 Ch. D. 266 at p.292 which was quoted in support by the Privy Council.

since such consideration would be confusing the issue of validity of the marriages with the legitimacy of the children. The one is not a correlative of the other. It was in the relation to this point that they quoted, with approval, the judgment of Romer J., in Re Bischoffsheim[23] to substantiate the practice of the Privy Council in separating the legitimacy of a person from the means by which such relationship was acquired.[24] In Bischoffsheim's case, Romer J., had stated that

> "where succession to personal property depends on the legitimacy of the claimant, the status of legitimacy conferred on him by his domicile of origin (i.e. the domicile of his parents at birth) will be recognised by our courts; and if that legitimacy be established, the validity of his parents' marriage should not be entertained as a relevant subject for consideration".[25]

It becomes clear that though it may be incorrect to say that there is no link between marriage and the concept of legitimacy, in that if the parents of a child are lawfully married, such child will be considered legitimate in almost all systems of law: But in so far as it goes that a valid marriage of one's parents is an indisputable pre-requisite to the person's legitimacy, the case of Bamgbose v. Daniel [26] has established the principle for the Nigerian private international law that such condition precedent cannot be maintained. What matters for the universal validity of the legitimacy of a person is that such status must have been conferred by the law of domicile of his parents at the time the person was born. The fact that the parents' marriage would have been void if tested by the Nigerian municipal law, including its conflicts rules, is immaterial.

No doubt, the formulation by the Privy Council of the

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23. [1948] Ch.79.
24. e.g. Khoo Hooi Leong v. Khoo Hean Kwee [1926] A.C.529.
25. [1948] Ch. 79 at p.92.
26. [1955] A.C.107.

choice of law rule for determining the legitimacy of a person as the lex domicilii of the parents at the date of the person's birth, was adequate for the situation which arose in Bamgbose's case. It, however, does not cover the situation where the countries of domicile of the parents at the date of the child's birth were different. Thus in Bamgbose's case, the parents of the twelve children were not only nationals of, but also domiciled in, Nigeria where they lived throughout their lives. Consequently it was not necessary for the court to determine which law or laws of domicile, whether that of the father or that of the mother or both, should govern the legitimacy of a person whose parents were domiciled in different countries at the time of his birth. Example of this situation is the case where the parents of a child had contracted a void marriage and the mother retained her ante-nuptial domicile which is different from that of the husband at the time of the child's birth; or a child may be born shortly after the dissolution of a valid marriage of his parents and at a time when the mother had acquired a separate domicile of her own. In such cases, which lex domicilii or leges domicilii will suffice?

At least two suggestions could be made as regards such choice of law determinant. These are, that the law of the domicile of the mother's husband or that of the person who claims to be the father of the child, at the time of the child's birth, should govern; or that the law of the domicile of the child's mother, at the time of the child's birth, should determine the question. To these may be added, in the case of a foundling, the law of the place where it was found. The last solution is so obvious for the special circumstances of such situation that no further comment will be necessary.

The law of the country of domicile of mother becomes indefensible on the ground that legitimacy in Nigeria, as in most countries, connotes a legal relationship between a father and his natural child. As aptly put by Obi,[27] "the Nigerians proverbial desire for children has led to the principle that every child is affiliated to (i.e. is a member of) some family at birth". In other words, even though considered illegitimate, a child still acquires membership of his mother's extended family and has certain rights and priviledges almost commensurate with those of other members. Therefore, the incidents of illegitimacy in Nigeria is no more than that a child so born has no enforceable rights as against his natural father. That legitimacy is a process of establishing a relationship primarily between the father and the child is, perhaps, borne out by such judicial pronouncements by Nigerian judges that a child, if legitimate, "belongs" [28]or "becomes the property of"[29] the father.

That the lex domicilii of the father governs, is the suggestion offered by the decision and dicta in all the cases[30] cited with approval by the Privy Council in Bamgbose v. Daniel.[31] For example, Kindersley V.C., in Re Don's Estate, [32] purporting to offer a prospective solution to the question as to which law determines the legitimacy of a child if the law of domicile of the parents at the time of his birth are different, said: "If it were necessary for me to determine these questions, I

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27. Modern Family Law in Southern Nigeria, pp.285-286.
28. Amachree v. Goodhead (1923) 4 N.L.R.101.
29. Mariyama v. Sadiku Ejo (1961) W.N.N.L.R.81 at p.82.
30. Re Don's Estate (1857), 4 Drew 194; Re Andros (1883) 24 Ch. D.637; Re Grove (1887) 40 Ch.D.216.
31. [1955] A.C.107.
32. (1857) 4 Drew. 194 at p.197.

should hold that the law of the father's domicile governs". The Vice Chancellor's view was succintly laid down as a general rule several years later in Re Andros [33] where Kay J., in giving the view of the majority of the Court of Appeal, said:

> "A bequest .... to the children of A. means to his legitimate children, but the rule of construction goes no further. The question remains, who are his legitimate children? That certainly is not a question of the construction of the will. It is a question of status. By what law is status ot to be determined? ..... The law, as I understand it, is that a bequest of personality ..... to the children of a foreigner means to his legitimate children, and that by international law, ... those children are legitimate whose legitimacy is established by the law of the father's domicile."

Besides the point that these cases were specifically referred to in Bamgbose's case, the principle enunciated in them constitutes common law rule established before the 1st of January, 1900, and therefore applies, as we have shown,[34] as part of the Nigerian law.

That the lex domicilii of the father is decisive is the preponderant view of academic writers [35] and the rule accepted by most continental systems.[36] In our view, it is the most logical and the most practical. We may accordingly attempt a reformulation of the test for determining the legitimacy of a person born during a lawful or an ostensible marriage of his parents as follows:

> The legitimacy of a child claimed to have been born during the existence of a lawful or an ostensible marriage between his parents is to be determined by the law of the country or state in which the mother's husband, or the man alleged to

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33. (1883) 24 Ch. D. 637 at p.642.

34. Supra Chapter One.

35. See e.g. apart from the standard text books, K. Lipstein, op.cit., p.611; Egon Guttman, 14 Rutgers L. Rev.764 at p.783.

36. See Rabel, op.cit., Vol.I, p.603.

be the father of the child, was domiciled
at the time of the child's birth.

The adoption of this rule will mean that the choice of law rule for determining the status arising from birth in lawful or putative marriage will not differ radically in character from the one being operated in respect of other modes of acquiring legitimate status in Nigeria.[37]

C. LEGITIMATION BY SUBSEQUENT MARRIAGE.

1. POSITION AT COMMON LAW.

At common law, the choice of law rule for determining whether a legitimate status is conferred on an illegitimate child by the subsequent marriage of his parents was finally established in 1887 by the Court of Appeal in England, after the initial uncertainty created by the vacillation of the lower courts. The first distinct authority on this point is the case of Re Wright's Trusts.[38] By his will, Joseph Wright bequeathed the sum of £4,500 to his son, William, for life and stipulated that the remainder should be shared by all the children of William. The testator died in 1814. William, who was domiciled in England, had seven children by his marriage to Mary. Mary died later. After her death, William went to France and there cohabited with a woman, Florence, to whom he was not married. Out of this association a daughter was born. Subsequently, William acquired a French domicile and entered into a marriage with Florence. The effect of this marriage, according to the French law, was that since the parents of the illegitimate

37. See below.
38. (1856) 2 K & J. 595.

daughter acknowledged her as their own at the time of their subsequent marriage, the daughter became legitimated by virtue of the marriage. At the time of death of William, only two of the children of his first marriage were living. These claimed the whole of the legacy left by their grand-father's will as the only surviving children of William. On the other hand, William's legitimated daughter claimed to be entitled to one third share of the legacy. The crux of the case, therefore, was whether the daughter, legitimated by the subsequent marriage of her parents in France, should be regarded as a legitimate child from the view point of English law for the purpose of sharing in the legacy.

Sir Page Wood V.C., gave two reasons for his decision that the daughter could not take. First, he held that the legitimacy of a child born outside marriage at a time when the father of the child was domiciled in England, must be determined by the English law regardless of where the subsequent marriage of the parents was contracted. And that once English law fastened indelibility of bastardy on the child, no other personal law subsequently acquired by the father changing his domicile could alter the illegitimate status of the child.

Secondly, a gift to "children" in an English will must be construed according to the English notion of legitimacy. Since legitimation by subsequent marriage was then not a conception of the English law, a testator in England should not be credited with the knowledge that such a mode of determining the legitimacy of a person existed under some foreign law. Hence in Boyes v. Bedale, [39] where legitimation by subsequent

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39. (1863) 1 Hem. & M. 798.

marriage complied with the French law of domicile of the child's father at the date of the child's birth and at the date of the parents' subsequent marriage, Sir Page Wood was still able to exclude the legitimated child from taking under an English will on the second ground for his decision in Re Wright's Trusts. According to him, the question, who is a child in a will made by an English testator, is a matter of construction to be decided by the English lex successionis and not one of status.

The reasoning in Boyes v. Bedale was rejected by a majority of two to one in the Court of Appeal decision in Re Goodman's Trusts.[40] In the latter case, the issue was also whether a child was validly legitimated by the subsequent marriage of his parents outside England. Both at the time of the child's birth and at the date of the subsequent marriage of the parents, the father was domiciled in Holland where such child was considered legitimate for all purposes. Cotton L.J., and James L.J., held (Lush L.J., dissenting) that since the child was legitimate according to the law of the country where the parents were domiciled at the two relevant dates, the status should be recognised in England for all purposes except for the purpose of succession as an heir to real property. Consequently, the child was held entitled to claim as next of kin on the intestacy of his uncle under the statutes of distribution. Thus, the second ground for the decision in Re Wright's Trusts [41] having been rejected by a majority in Re Goodman's Trusts,[42] the first arm of the decision in the earlier case was preserved. That is to say that, the common law rule regarding the legitimacy

40. (1881) 17 Ch. D. 266.
41. (1856) 2 K & J 595.
42. (1881) 17 Ch. D. 266.

of an ante-natus whose parents subsequently intermarried is that such matter of status is to be decided by reference to the law of domicile of the father at the time of the child's birth and at the time of the parents' subsequent marriage. This law, at the two relevant dates, determines whether only the celebration of the marriage legitimates the child, as in most countries, or whether there should be something super-added, as in France, or in some States of America, where a formal acknowledgment of the child must accompany the parents' marriage. This two-fold rule was followed in Re Andros [43] and finally confirmed by a unanimous decision of the Court of Appeal in Re Grove.[44] And this was the position at common law before the identical Legitimacy Laws of the Nigerian states provide for a different solution of their own to the problem.

2. POSITION UNDER THE LEGITIMACY ACT, 1929.

In relation to the law of which country or state should determine the legitimacy of a person who alleged that the subsequent marriage of his parents had legitimated him, two sections are relevant in the identical Laws of the Nigerian states. Section 3 (1) of the Western State Legitimacy Law provides:

> "where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Law, the marriage shall, if the father of the illegitimate person was or is, at the date of the marriage, domiciled in the State, render that person, if living, legitimate from the commencement of this Law, or from the date of the marriage, whichever last happens."

And as regards the recognition of the status of legitimacy alleged to have been created by a foreign law as a result of such subsequent marriage, section 9(1) of the Law further provides:

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43. (1882) 24 Ch. D 637.
44. (1887) 40 Ch. D. 216.

> Where the parents of an illegitimate person marry or have married one another, whether before or after 17th October, 1929, and the father of the illegitimate person was, or is, at the time of the marriage, domiciled in a place other than within the Western State, by the law of which the illegitimate person became legitimated by virtue of such subsequent marriage, that person, if living, shall in the State be recognised as having been so legitimated from the above date or from the date of the marriage, whichever last happens; notwithstanding that his father was not at the time of birth of such person domiciled in a place in which legitimation by subsequent marriage was permitted by law.

In short, the law of the domicile of the father of an illegitimate person at the date of his parents' subsequent marriage determines whether the marriage makes him legitimate or not. This is regardless of whether or not the ceremony of marriage was celebrated in a place the law of which does not permit legitimation. If the effect of the marriage according to the law of domicile of the father at the relevant time is that the marriage legitimated his illegitimate child, the child becomes legitimated.

It will therefore be seen that section 9 of the Law dispenses, for purposes of recognition under the statute, with the common law requirement that legitimation by subsequent marriage must have been authorised by the law of the country in which the father of the illegitimate child had his domicile at the date of the child's birth. Under the Law, it is sufficient to show that the law of domicile of the father at the time of the marriage allowed the establishment of a person's legitimacy by such process. This approach is gratifying; but the main disadvantage of establishing legitimacy through the statute is that the status of a person legitimated under the statute dates from the time of the marriage of his parents or 17th October, 1929, whichever last happens; whereas at common law, legitimation by subsequent marriage, if established, dates

from the time of birth of the person concerned. In view of the fact that legitimation by paternal acknowledgment in most States in Nigeria confers legitimacy from birth on an illegitimate child irrespective of when his father acknowledges his paternity, it has been suggested in the preceeding Chapter that it is undesirable, in modern times, to date the legitimacy of a person legitimated under the provisions of the Law from the time of the subsequent marriage of the parents or the commencement of the Law. And, furthermore, that Nigeria should bring its law into line with those of other civilized countries by accepting the recommendation of the United Nations Sub-Commission which provides that "any child born of parents who intermarry after the birth of that child shall be considered to be born of that marriage". [45]

If the above suggestion is accepted, there will be no necessity for the Nigerian private international law to follow the approach adopted by the English court in Re Hurll [46] where it was held that the English Legitimacy Act of 1926 (of which the Nigerian statutes are almost carbon copies) does not affect the capacity of an illegitimate child to be legitimated at common law and that the choice of law rule which demands compliance with the law of the country of the father's domicile at the date of the child's birth and at the time of the subsequent marriage, has not been abrogated. No doubt, such a decision was influenced by the fact that legitimation by subsequent marriage

45. See s. 5 of Part I of the General Principles on Equality and Non-Discrimination in respect of Person Born out of Wedlock, U.N. Doc. E/CN.4 Sub.2/L.453 of January 13, 1967. (Appendix 4 of this work).

46. [1952] Ch.722.

at common law has more beneficial effects than such legitimation under the English Act, in the sense that the former confers full legitimacy from birth while the other, as in Nigeria, reckons legitimacy from the commencement of tha Act or from the time of the subsequent marriage, whichever is later.

Furthermore, the requirement of the common law that the illegitimate child must be endowed with capacity for legitimation by the law of domicile of his father at the time of his birth, has been the subject of adverse comments and criticisms. For instance, the reasoning underlying the rule, i.e. that the law of domicile of the father at the time of the child's birth irrevocably fixes the child's status, was disapproved of by the dissenting judgment of Scott L.J., in Re Luck's Settlement.[47] According to the Lord Justice, "the very idea of attributing to a newly born child, to a filius nullius, a sort of latent capacity for legitimation at the hands of the natural father to whom he is denied any legal relation, seems to me an .... absurd legal fiction". In Blythe v. Ayres,[48] Garoutte J., in giving the judgment of the Supreme Court of California on the same point, finds the English common law rule unusually "antagonistic" and, therefore, a bad law. Practically, all text writers stand on common ground in condemning this rule. It was rejected by Savigny[49] and Bar.[50] Rabel finds it too artificial to be rational.[51] Cheshire considers the extension of this archaic theory in the field of private international law a "negation of commonsense and principle",[52] while Graveson is of the view that the

47. [1940] Ch.864.
48. (1892) 96 Cal.532, 31 Pac.915.
49. op.cit., p.302.
50. op.cit., p.434.
51. Rabel, op.cit., Vol.I, pp.614-615.
52. Cheshire, op.cit., 7th ed., p.374.

principle is "pre-eminently illogical".[53] In Nigeria, the various statutes have dispensed with the concurrence of the law of the father's domicile at the time of the child's birth.

With this welter of adverse criticisms and rejection by statutory provisions, it is submitted that the Nigerian judges will do well to proclaim the formal demise of the common law principle of recognition of legitimation by subsequent marriage. That the Nigerian municipal laws do not in principle subscribe to the theory of indelibility of bastardy is borne out by the conception of legitimation by paternal recognition, the effect of which (under the various state laws) is that the legitimacy of a child so legitimated relates back to the time of his birth. The common law of England to which, originally, legitimation by subsequent act was an alien conception should not debar the Nigerian private international law rules from reflecting such conceptions of its domestic law. With the confident hope that our suggestion will be accepted, the private international law rule of this topic, both at common law and under statute, is stated as:

> Whether the subsequent marriage of the natural parents of an illegitimate child makes such a child legitimate depends on the law of the country or state in which the child's father is domiciled at the time of the marriage.

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53. Graveson, op.cit., 6th ed. p.389.

D. LEGITIMATION BY SUBSEQUENT ACKNOWLEDGMENT OF PATERNITY.

We have discovered from our consideration of the domestic law that legitimation by paternal acknowledgment or recognition is a process for ascertaining the legitimacy of a person in the majority of the states of Nigeria, just as is the position in some civil law countries and certain states of America. Authority is, however, lacking in the Nigerian law with regard to how a choice of applicable law should be made in conflictual situations. For example, a child may be born illegitimate in country or state A, at a time when his parents were domiciled there, or at a time when they were domiciled in country or state B. Later the parents might migrate to country or state C where they do an act the effect of which was to confer legitimacy on the child. By reference to the law of which place is the status of the child to be determined.

In principle, the conflict rule governing this sort of situation ought not to be different from the one regulating legitimation by subsequent marriage. In each case legitimacy depends on subsequent parental act. This much is accepted by the common law world. But for the interest the divergent solution to this problem has created in the two common law countries whose courts had tackled it, we shall compare, briefly, the different methods of approach adopted by the English common Law and the American version of it in order to enable the Nigerian courts to choose the better of the two.

The first and the only case so far which has arisen in England as regards which law determines the validity of a purported legitimation by paternal acknowledgment, made in

accordance with a foreign law, in Re Luck's Settlement.[54] The facts were that one George Luck, domiciled in England, settled certain properties on his children and grandchildren at the time of his marriage and gave other interests to them by his will. One of the children of George Luck was Charles Luck. Charles had two children by his wife, Clare Henrietta. In addition, Charles Luck had, on July 29, 1906, an adulterine child, namely, David Luck, begotten by a spinster, Martha Anne Croft. On July 19, 1922 the marriage of Charles to Clare Henrietta was dissolved and eight days later, he married a third woman, one Alma Hyam. By a document dated October 23, 1925, Charles, with the consent of Alma Hyam, formally acknowledged David as his legitimate son. At the time of David's legitimation byopaternal acknowledgment, his father, Charles, was domiciled in California and according to the Californian Code, the effect of such acknowledgment was that David ceased to be illegitimate and became "for all purposes legitimate from the time of his birth", i.e. July 29, 1906. At the time of David's birth, however, it was found that his father was still domiciled in England where, of course, legitimation by paternal recognition is not permitted. The question posed was whether David could take under the settlement and the will as the legitimate son of Charles Luck.

As regards this question, the Court of Appeal held, rightly in our view, that the principle laid down for determining which law governs legitimation by subsequent marriage covers the case of legitimation by parental recognition. But in our view, the majority erred (Scott L.J., dissenting) in finding nothing intrinsically wrong in supporting the so-called

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54. [1940] Ch.864.

theory of potentiality of legitimation according to which the lex domicilii of the child's father at the time of the child's birth must concur with the father's lex domicilii at the time of acknowledgment, in permitting legitimation by such process. The court, therefore, held that since the English law of domicile of David's father at the time of his birth made David's status of illegitimacy immutable, no subsequent acquisition of domicile by his father in a country where paternal acknowledgment is a lawful mode of legitimation could change David's initial status of bastardy attaching to him under English law. Accordingly, he was not entitled to shares under the settlement and the will.

The common law requirement that legitimation by paternal recognition must be possible according to the law of domicile of the child's father at the time of the child's birth has been criticised in our consideration of the rule in connection with legitimation by subsequent marriage. But in so far as the English law is concerned, it must be pointed out that it seems certain that the hard decision in the above and other similar cases will be impossible to reach in future by English courts. As we have indicated, the sole matter in dispute in Re Luck's case was whether David, the illegitimate child who was legitimated by his father according to Californian law, was the "child" of his father for the purpose of taking under a marriage settlement and a will. Now, according to section 15(1), (2) and (8) of the Family Law Reform Act, 1969 which came into effect in England on 1st January, 1970, in any disposition made after the commencement of the Act in which a settlor or testator gives property or interests in property to his children, the children of any person, or to any person who would have been a relative of the settlor or testator were

it not for the fact that such person was born illegitimate, then such expression "children" or "relative" includes, unless a contrary intention appears, an illegitimate child or any person who would have been a relative of the settlor or testator in some way had he, or some other person through whom he deduces his relationship, been born legitimate. But in the absence of similar provisions as above in Nigeria, some conflicts principles must be found to achieve a result belatedly reached by the English statute.

The theory that the law of domicile of the father must endow his illegitimate child with the potentiality of legitimation at the time of the child's birth before a subsequent act of the parents could make the child legitimate has never been accepted in America. There, it has long been established that if a father had attempted to legitimate his illegitimate child by acknowledgment of paternity, such legitimation will be effective in an American state if the result of the acknowledgment, according to the law of the domicile of the father at the time of acknowledgment, is to confer legitimacy on the child.[55] This is so even though the state where the legitimacy of the child is to be recognised has no statute providing for legitimation by paternal acknowledgment.[56]

The leading authority for this principle is Blythe v. Ayres.[57] In this Supreme Court of California case, Thomas Blythe was the natural father of an illegitimate daughter, Florence, who was born to him in England by Julia Perry. Thomas Blythe

55. Blythe v. Ayres (1892) 96 Cal. 532, 31 Pac.915; Pfeifer v. Wright (1930) F. 2nd 464; Irving v. Ford (1903) 183 Mass.448, 67 N.E.366; Holloway v. Safe Deposit and Trust Co. (1926) 151 Md. 321; In Re Slater's Estate (1949) 195 Misc. 713, 90 N.Y.S. 2d 546.

56. In Re Slater's Estate (1949) 195 Misc. 713, 90 N.Y.S. 2d 546.

57. (1892) 96 Cal. 532, 31 Pac. 915.

and Julia Perry were never married. The daughter was merely conceived during Blythe's temporary sojourn in England and was born after Blythe's departure to California. At the time of the daughter's birth, Blythe was domiciled in California where he had always lived, whilst Julia was domiciled in England. Blythe's natural daughter never went to California until after her father's death. Nonetheless, she claimed a right to succeed to Blythe's rather large intestate estate by reason of certain acts alleged to have been performed by Blythe during his lifetime, the effect of which was that the daughter became legitimate under section 230 of the California Code. The section provides that the father of an illegitimate child may legitimate it from the time of its birth by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were legitimate.

The Supreme Court had one difficult hurdle of construction to jump before it dealt with the problem of conflict of laws involved. This was the provision of the section which requires the putative father "to receive" his illegitimate child "into his family". How could Blythe, who died a bachelor and without parents, have received into his family a daughter who was born in England after his departure from that country. Moreover, the daughter did not visit California until after Blythe's dath. On this point, the court held that Blythe had a constructive family into which he constructively received the daughter. The second problem, that of conflict of laws, was whether the Code applied to an illegitimate child who was born and resident out of California. The court was unable to find an American or English authority to guide it on the specific issue of choice of the applicable law relating to legitimation

by parental recognition, but clearly recognised that there was no essential difference between legitimation by subsequent marriage and legitimation by acknowledgment and that the choice of law rule applicable to one should apply to the other. It, however, found that the assertedly general rule of the English common law which referred the legitimacy of an illegitimate child whose parents subsequently intermarried, to the law of domicile of the child's father both at the time of the child's birth and at the time of the father's marriage, was unacceptable to the Californian courts. With regard to the doctrine of "indelibility of bastardy" which underlies the English rule, Garoutte J., who gave the judgment of the court said:

> "Legitimation is the creature of legislation. Its existence is solely dependent upon the law and policy of each particular sovereignty. The law and policy of this state authorise and encourage it, and there is no principle upon which California law and policy, when invoked in Californian courts, shall be made to surrender to the antagonistic law and policy of Great Britain". [58]

Instead, the court promulgated a new rule of its own to the effect that legitimation by subsequent act of the child's parents depends on the law of the father's domicile at the time of the alleged acts of legitimation, a principle which now constitutes the black-letter rule of the American Restatement on the Conflict of Laws.[59] As regards the facts of the case, it was held that since Blythe had performed acts which legitimated his natural daughter according to the Californian law of his domicile, the daughter suceeded to his estate even though she had no direct contact with California. In the view of the court, "oceans furnish[ed] no obstruction to the effect of [California's] wise and beneficial provisions". [60]

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58. Blythe v. Ayres (1892) 96 Cal. 532 at 575, 31 Pac.915 at p.921
59. Tentative Draft No.4 of 1957, s. 140.
60. Blythe v. Ayres (1892) 96 Cal. 532 at 563, 31 Pac.915 at p.917.

It is submitted that similar considerations which moved Garoutte J., in making amelioration to the apparent harshness of the English common law exist in Nigeria. Legitimation by paternal acknowledgment is a progressive policy of most systems of law in the country whereas in English domestic law, that concept is not permitted. Therefore, the rule of Nigerian private international law should be more concerned, like the American jurisprudence, with the removal of obstacles to the legitimation of children at the inter-state as well as the international level. In our view, a person should be considered legitimate from his birth in any state in Nigeria if his father had acknowledged his paternity in accordance with the law of the state or country in which the father was domiciled at the time of the acknowledgment.

CHAPTER SEVEN

ADOPTION

A. PRELIMINARY OBSERVATIONS AND PROBLEMS OF CONFLICT OF LAWS

Kinship in the full sense of the term is created by conception and birth. All the criteria for determining legitimacy dealt with in the last chapter are concerned with the establishment of the legal ties of paternity and maternity in respect of children who are so related by nature. Adoption, however, is a process whereby the relationship of parent and child is created between two people who are not necessarily related by nature. Therefore, it is an artificial relationship the effect of which is the substitution of the adoptive parents for the natural parents in so far as a child's rights and duties are concerned. In other words, an adoption puts an end to parental obligations and creates a full set of obligations on the part of the adoptive parents even though it could not change blood ties between the child and its natural parents.

Adoption is of great antiquity in some countries. It was mentioned in the Bible. It was known to the ancient Greeks and the Romans. It is not an alien institution to some systems of traditional and modern customary laws in Africa and Asia.[1] Several factors motivate the establishment of the institution. For example, the motive of some ancient laws e.g. the Roman law,

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1. For Nigeria, See Aminatu Alayo, Administrator - Gen. V. Tunwase (1946), 18 N.L.R. 88; For Kenya, See A.J.F. Simance "The Adoption of Children among the Kikuyu of Kiambu District" in 3 J.A.L. (1959) 33; and for Botswana, see Adoption of Children Proclamation, Cap.43, 1959 ed., s.15.

was the perpetuation of the family sacra; whilst the function of adoption in Hindu law is to maintain ancestor worship. In African[2] and modern systems of law, the purpose of adoption in the ancient laws has either never been accepted or has given way to the more humanitarian motive of protecting the orphan and furthering the welfare of the waif, though not unnaturally, adoption has also been used by legal systems with strict laws on legitimacy as a means of reducing the incidents of illegitimacy. This factor seems to explain why the range of persons who could be adopted in the Eastern Nigerian States is much more extensive than in the Lagos State.[3] Therefore, to cater for both this narrow and wide scope of adoption in the various legal systems, not only in Nigeria, but at the international level, the definition of Sir Alfred Hopkin can hardly be improved upon for purposes of the Nigerian private international law. It reads: Adoption is

> "the act of a person taking upon himself the position of a parent to another who is not in fact, or is not treated by law, as his child, and the person so acting is recognised by law as having the rights and duties of a parent by nature". [4]

The two statutes so far on Adoption in Nigeria have some

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2. See e.g. A.J.F. Simance, ibid.

3. In Lagos, as we have shown in our Chapters on Legitimacy, a person's legitimacy may be established by proof of (a) his birth in an antecedent marriage of his parents, (b) their subsequent intermarriage in a monogamous form, or (c) acknowledgment of his paternity by his putative father. Hence, adoption as a means of conferring legitimacy on an otherwise illegitimate child becomes superfluous in the Lagos State, especially in view of method (c). In the Eastern Nigerian States, on the other hand, only methods (a) and (b) above are permitted by law. Adoption, therefore, constitutes an additional mode of establishing legitimacy of a person who was born illegitimate.

4. Encyclopaedia Britannica (1947 ed.) p. 177.

interesting historical antecedent. Though they constitute an exception to the usual process of adaptation of an English Act by re-enactment, nonetheless, they both reflect the English law ideas since they originate, albeit indirectly, from English law sources. The first area in the common law countries of Africa to which statutory adoption was introduced is Uganda. This was in 1943.[5] Then followed similar legislation in Malawi,[6] Zanzibar,[7] Botswana,[8] Tanganyika,[9] Zambia[10] and Kenya.[11] All these statutes were enacted during the colonial era and were therefore modelled on the existing English Adoption Act or Acts, at the time of their enactments, though some of them have incorporated the provisions of later English statutes into their own enactments. There is sufficient similarity between the Adoption laws of the above countries and the Ghana Adoption Act of 1962[12] to warrant the assertion that the Ghana Act derives its inspiration from the laws of the above countries south of the Sahara. The 1965 Adoption Law of the Eastern States of Nigeria is almost a verbatim copy of the Ghana Act,[13] while the Lagos

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5. See Adoption of Children Ord., Cap.19, Laws of Uganda (1951 ed.).
6. 1949, See Adoption of Children Act, Cap.26.01, Laws of Malawi (1968 ed.).
7. 1951, See Adoption of Children Decree, Cap.55, Revised Laws of Zanzibar 1959.
8. 1952, See Adoption of Children Proclamation, Cap.43, Laws of Botswana (1958 ed.).
9. 1953, See Adoption Ord.Cap. 335, Tanganyika Rev.Laws, 1950-1954.
10. 1956, See Adoption Ord.Cap.136, Laws of the Republic of Zambia, (1965 ed.).
11. 1958, See Adoption Ord. Cap. 143, Laws of Kenya (1962 ed.).
12. Act 104 of 1962.
13. In this respect, we must disagree with Messrs Kasummu and Salacuse, op.cit. pp.242-243, and Dr. S.E. Imoke, (Eastern Region House of Assembly Debates, Vol.5 No.1, 1965) p.46, who are of the view that the Eastern Nigeria Adoption Law, 1965 is a copious copy of the English statutes. A section by section comparison of the English, the Ghanaian and the Eastern Nigeria statutes reveal that the latter two have much more in common by way of presentation, substance, terminology and even punctuation.

Adoption Edict of 1968, though designed for a special purpose, viz. to cater for the Nigerian civil war orphans, reflects the general feature of such enactments in the rest of the continent. The position, therefore, is that out of the twelve States of the Federation of Nigeria, statutory adoption operates in four viz. the Rivers state, the South Eastern state, the East Central state and the Lagos state. And as in England, an adoption order in Nigeria or in any of the above-named African countries will only be made if it will be for the welfare of the child.

Of course, one is only too happy to admit that there are closer ties binding these African countries together and which allows a liberal acceptance of each other's laws. But in so far as conflict rules are concerned, the lamentable aspect of this African co-operation in legislative experiment is that the insufficient development of the theory and practice of private international law revealed in almost all the other African countries' enactments on adoption has been accepted in the four Nigerian states. Furthermore, the Lagos Edict introduces some complexity into the problem by initiating some recognition rules which are so general in content to be of any practical advantage. The courts will have no alternative but to devise their own solutions. And the purpose of this work is to help them to formulate such rules. But more of this later.

As in most common law countries, adoption in the Nigerian states emanates from a court's order. In the Eastern Nigerian states, an adoption may only be granted by either the High Court or the Magistrate's court at the option of the applicant.[14] Whereas, in the Lagos state, only the juvenile court may grant

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14. Eastern Nigeria Adoption Law, 1965 s.11(1).

such order although an appeal lies from it to the High Court.[15] An adoption order is granted by the court upon the favourable report by administrative officers. Has there been residence of the child with the prospective adopter for a trial period of three months? Has the relationship between the prospective adopter and the child during this period given rise to reasonable probability that the prospective adopter will be able to provide a good home for the infant? Are the child's natural parents (in the case of the Eastern Nigeria Adoption Law only) or any person having legal rights over it, still desirous, after the expiration of the trial period, to relinquish their rights and control over the child? Or was their prior consent the result of a hurried and abrupt decision to give up the child? Finally, is the application for adoption dictated by altruistic considerations and not motivated by a desire to derive some material benefits from the adoption of the child? All these are the questions to be answered affirmatively in the social welfare officer's report before the court could be satisfied that the adoption order, if granted, will be for the welfare of the infant. In other words, the court is asked not merely to decide on the legality of the proposed adoption but also on its advisability. This procedure is in contrast to that in some civil law countries[16] where adoption is the result of inter-party agreement, or contract, which is merely to be approved by the court; and markedly different from the position under some

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15. Lagos Adoption Edict, 1968, s.8.

16. See Rabel, op.cit., Vol.I, p.679 and also O. Kahn-Freund, The Growth of Internationalism in English Private International Law, p.63.

systems of customary law in Nigeria and elsewhere where adoption is the exclusive concern of the prospective adopter, on the one hand, and the child to be adopted and his family, on the other hand. Indeed, the intention of the Eastern Nigeria Adoption Law is to put an end to the "spurious methods and laws" by which customary adoptions were being effected.[17]

A child adopted under any of the Nigerian statutes is fully integrated into the family unit of the adoptive parent or parents since the order extinguishes all rights and duties, obligations and liabilities, of the natural parents of the child, whether arising under the general law or the customary law, and vests them in the adoptive parents. Hence, as from the date of the order, the adoptive parents become responsible for the education, maintenance and custody of the adopted child as if he had been born in lawful marriage.[18] In the case where the adoption order was granted to a man and his wife, the adopted child stands to the other children of the spouses, whether by a previous adoption, birth in lawful wedlock, or legitimation by subsequent marriage or by acknowledgment, as a full brother or sister. If the order was granted to a single adopter, the adopted child stands to the adopter in full legitimate relationship.[19] If he or she later marries and has natural children, the adopted child becomes a brother or sister of the "half-blood" to such natural children. This follows inferentially from the term of both provisions which stipulate that an adopted child shall have rights as if he was born to the adopter in

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17. See Eastern Nigerian House of Assembly Debates (1965) Vol.5 No.I, Column 49.

18. Eastern Nigeria Adoption Law, 1965, s.13; Lagos Adoption Edict, 1968, s.12.

19. Ibid.

lawful marriage.[20] Also, both the adopter and the adopted child have rights of mutual inheritance on the death intestate of either of them.[21] And furthermore, an adopted child takes on equal terms with other children of the adopter on his intestacy, or under any disposition inter vivos any person might make in consequence of which he gives property to the adopter's "children".[22] In short, an adoption order, under any of these statutes, operates to divest the adopted child of its natural parentage as if it had never existed and gives it to the adopter. None of the enactments, however, resolves the important question as to whether the adopted child continues to be the issue of his natural parents for the purpose of the laws relating to incest and the prohibited degree of marriage by reason of consanguinity. It is submitted that for these purposes, the blood relationship still continues. Consequently, a father could not marry his daughter whom he had given away in adoption to a stranger in blood, neither could he plead the adoption as a defence if he commits the offence of incest against her.

If all the municipal systems of the world, including those of the Nigerian states, could enact identical laws on adoption, the question of choice of law or which court has exclusive jurisdiction will become irrelevant. But a short survey of some legal systems will show that adoption is differently fashioned in different countries and states or provinces of the same

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20. Eastern Nigeria Adoption Law, 1965, s.13; Lagos Adoption Edict, 1968, s.12.

21. s.14(1) of the Eastern Nigeria Adoption Law, 1965, and s.13 of the Lagos Adoption Edict, 1968.

22. s.14(2) of the Eastern Nigeria Adoption Law, 1965; and s.14 of the Lagos Adoption Edict, 1968.

political entity. The term itself characterises, at least, two different kinds of relationships, not to mention the diversity of its effects even in countries where it means the same thing. Adoption to majority of countries connotes the complete severance of the ties between the adopted and his natural parents and his full integration into the family unit of the adoptive parent. The result is that the adopted child enjoys not only the rights to custody, maintenance and education but full rights of succession in the adopted parents' family on equal basis with their legitimate children. But in some other countries, e.g. Alabama, Botswana, California, Denmark, Greece, South Africa and Switzerland, adoption only permits the slackening of the legal ties between the adopted child and his natural parents but does not sever them. Consequently, a child adopted in any of these countries has a dual right of inheritance, ab intestato, both from his natural parents as well as from his adoptive parents. At the other end of the picture, in some other countries, particularly in the civil law countries, the incidents of adoption in so far as the adopter is concerned is to care for and educate the adopted child. No right of inheritance, whether mutual or unilateral, is involved. As a result of its civil law connection, this was the position in Scotland until 1964 when the law was altered by the Succession (Scotland) Act, an act which for the first time gives an adopted child rights of succession to his adoptive parents' property. Even in England, it was not until 1950 before adoption gave the child so adopted the right of inheritance from his adopter. Nearer home, an adopted child is still unable to claim any right of succession or proprietary right from his adoptive parents in

Uganda and Malawi. In these two countries, an adoption order does not deprive the child of any right to, or interest in, property devolving from his natural parents.

In most common law countries, an adoption order, once made, is irrevocable but in Botswana, California, Denmark, France, Japan, South Africa and Quebec, rescission of an adoption is permitted either absolutely or upon certain conditions - e.g. in Botswana, California and South Africa, if the child is mentally disordered or defective. In Israel, an adoption is also revocable if

> "there was a breach of the duties owed by the adopting parent to the child or by the child towards the adoptive parent as would justify revocation of the order". 23

In Quebec, any "very grave ground" will suffice.[24] In Ghana, the Lagos and the Eastern Nigerian states, only an infant below the age of seventeen years can be adopted, whereas in majority of the other African common law countries, any person below the age of twenty-one can be adopted. In the Canadian Province of Quebec and some continental countries, persons of full age can be adopted as well. In most countries, only adults can apply for adoption orders, but in about eleven of the American states, statutes on adoption merely provide that "any person" or "any resident" may adopt a child. Presumably as a result of early economic independence of most infants in these highly industrialised states, such provision has been construed by the courts in these states as giving capacity to minors to adopt their less

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23. Draft Family Code for the State of Israel, (1956) s.105 (a)(2).

24. See Quebec, Adoption Act, Cap.218, Revised Statutes of Quebec, 1964, s.19.

fortunate ones.[25]

Some laws e.g. that of Peru and Switzerland, stipulate that the adopter be childless but most others do not. In France, the Law of November 1, 1966 abrogates the old restriction which made adoption impossible for any person who had already legitimate children. Now, such a person can adopt a child if the President of the Republic grants him a licence.[26]

In Israel, since adoption

> "does not put an end to the blood relationship between the adopted child and his natural parents (and his other relative) nor does it establish blood relations between the adopted child and the adopting parent ... adoption does not affect legal relations based on consanguinity as such e.g. prohibitions on marriage." 27

In other words, while an adopted child cannot still marry her natural father or brother after her adoption by a stranger in blood, nothing prevents her from entering into a lawful marriage with the adopter. In South Africa and Botswana, adoption is no obstacle to a marriage, for example, between an adopted daughter and the son of the adoptive parent even though such parent may not himself marry his adopted child; whereas adoption in the four Nigerian states creates a bar of consanguinity on the adopter and his natural children, on the one hand, and the adopted child, on the other. Finally, some countries have adoption statutes while some have never introduced the institution into their legal systems. This is precisely the position with the Nigerian states. And in the absence of a full faith and credit provision in the Nigerian Constitution, this state of

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25. See M. L. Leavy, The Law of Adoption, 2nd ed. 1954, p.18.

26. See 16 I.C.L.Q. (1967), pp.551-2.

27. Draft Family Code for the State of Israel, p.124.

affairs brings into the forefront the problem of recognition of sister-states adoptions.

Rather surprisingly, the two statutes on adoption at the interstate level in Nigeria have tended towards the same varied picture showed at the international scene. One or two examples will elucidate. Under the Eastern Nigeria Adoption Law, 1965, which, as we have seen, applies in all the three Eastern Nigeria states, a father or mother can adopt his or her illegitimate child either alone or jointly with his or her spouse.[28] But according to the Lagos Edict of 1968, only an infant who is an orphan or a waif may be adopted. If the child's natural parents are known, adoption must be refused them or any other applicant.[29] Secondly, under the Eastern Nigeria Law, a sole applicant who is a male cannot adopt a child, whether male or female, other than his natural son unless there are special circumstances which justify such an "exceptional measure".[30] On the other hand, the Lagos Edict only prevents a male person from adopting a female infant unless, in the opinion of the court, there are exceptional circumstances making such order desirable.[31]

The above illustrations will have shown that diversity is the rule rather than the exception in municipal legislations on

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28. Before leaving this point, a seeming gordian knot may be posited. F. and M. are the natural parents of C. their illegitimate child. Both are married to different persons. Both parents, with the approval of their respective spouses, want to adopt C. Under section 5 (1) of the Law, "an adoption order shall not be made except with the consent of every person who is a parent of the juvenile." Since each parent is desirous of adopting C., F. and M. naturally resent the idea that the other should have C. exclusively. Therefore, both refuse their consent. It may be assumed that both are able and willing to provide a good home for the child and have not at any time neglected him. With whose consent should the court dispense?

29. Compare s.3(3) of the Eastern Nigeria Adoption Law, 1965 with s.1 of the Lagos Adoption Edict, 1968.

30. Eastern Nigeria Adoption Law, 1965, s.4 (2).

31. Lagos Adoption Edict, 1968, s.3 (2).

adoption. They also emphasise the point that the various municipal laws are based on policy considerations of the respective countries, states or provinces, as the case may be. With such plethora of laws, conflictual aspects of adoption must sooner acquire added significance in Nigeria at the international and at the interstate levels: at both spheres because of the increasing mobility of our time which brings divers peoples, subject to divers laws, into continuing contact with the various systems of law in the federation of Nigeria. An additional factor at the interstate level has now been introduced by the last civil war which has made orphans of thousands of children in the country. The need to provide for the welfare of such children led to the promulgation of the Lagos Adoption Edict and is responsible for why similar measures are being contemplated as a matter of urgent governmental policy in the other states of the Federation.[32] Examples of the problems which the Nigerian private international law will be called upon to solve are (1) should a child adopted according to Botswana law be allowed to succeed on the intestacy of his natural father who died domiciled in the Rivers state? Which law, the Botswana or the Rivers', decides the question? (2) What are the rights in the Lagos state of an illegitimate child who was adopted by his natural parents in the South Eastern state a time when both parents and the child were domiciled in the Lagos state? The first example is an international conflict-adoption problem. The latter one concerns inter-state conflict. The role of the private international lawyer in this respect is to consider what choice

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32. See the statement made, in this respect, by the Federal Commissioner for Rehabilitation in "West Africa" of April 26, 1969, p.486, Column 2.

of law rules are better designed to advance the universal validity of adoptions granted in Nigeria or abroad in view of, or despite, the diversity of municipal laws as instanced above; bearing in mind that there is little virtue in advocating for stringent jurisdictional or choice of law rules which will make the beneficial status of adoption impossible.

Two topics will engage our attention in the chapter. The first concerns the court's jurisdiction to create the status of adoption which will have extra-territorial effect and the second deals with the problem of recognition of inter-state and foreign adoptions.

B. BASES OF JURISDICTION IN ADOPTION

Adoption is a statutory innovation unknown to the common law but for which the common law conception of jurisdiction has been ascribed on the prior analysis that adoption changes the status of both the adopter and the adopted child and that such status should be created by the court of domicile which regulates other matters of status. In other words, the conflict methodology of the common law countries is to give exclusive jurisdiction to the court of domicile. The same result is reached, albeit by a different approach, in some continental countries where Codes generally provide for the liberal assumption of jurisdiction coupled with a direction that the courts in exercising their jurisdiction should apply the personal law of one or both the parties.[33]

The problem of jurisdiction and choice of law is simplest

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33. For a detailed discussion on these two approaches on a comparative basis, See Rabel, op.cit., Vol.I, pp.681-691; Rodolfo De Nova, "Adoption in Comparative Private International Law" in 104 Recueil des Cours (1961) pp.75-112; and also, K. Lipstein, 12 I.C.L.Q. (1963) 835.

when all the parties to the adoption are domiciled in the same country or legal district. An adoption created by the law of such place will enjoy universal validity under most systems of law. If, in addition, the parties are national of such country, it is certain that the problem of universality of such status will be beyond dispute. Difficulties start to arise where the adopter is domiciled in one jurisdiction and the child is domiciled in another jurisdiction at the time of the adoption, which might have been created in one, or out, of these two jurisdictions. The problem may further be complicated by one or both the parties being nationals of countries other than those in which they are domiciled. In such situations, where is the court having exclusive jurisdiction to create the status of adoption to be located? Or expressed in another form, which law or laws should be applied, assuming that it is conceded that more than one legal district could lawfully create the status, to test the validity of the adoption? The two approaches detectable in the legal systems of the world for the creation of the status of adoption before it could be expected to have extra-territorial effect are (a) the Choice of Law Approach and (b) the Jurisdictional Method.

1. THE CHOICE OF LAW APPROACH

The legislator may, on ground of convenience, make adoption open to persons who are present or resident within his country or state, irrespective of their domiciles or nationalities, but ask the courts to establish the capacity of the prospective adopter and the child to enter into an adoptive relationship by reference to each party's personal law where such laws are different. This personal law, as we have seen, may be determined either by the party's lex patriae or his lex domicilii depending

on the connecting factor employed by the particular legal system. The two personal laws may be applied either "cumulatively" or "distributively".

To explain these terms further, the doctrine of cumulation presupposes that the validity of an adoption depends on the concurrent fulfilment of the conditions and requirements prescribed by each personal law of the adopter and the child. A distributive application of the two personal laws, on the other hand, entails that the requirements of adoption are split into two, the first category consisting of those requirements which pertain to the prospective adopter and his family, and the second, relating to the adoptive child and possibly his family. Some examples of the contents of the first category are such questions as, should the adopter be more than a certain age or should he be so many years older than the adoptee? Should he be married, and if so, should the consent of his spouse be an indispensable condition to his adopting a stranger in blood? Should he or should he not have legitimate children of his own? Among the second category are questions like, must the adoptee be an infant? Whose consent is necessary to his adoption? Could such consent be dispensed with and under what circumstances? Should his ties with his natural parents be completely severred? The doctrine of distribution presupposes that the matters enumerated in the first category should be determined by the personal law of the prospective adopter while matters falling within the second category should be decided by reference to the personal law of the person to be adopted.

Examples of the joint application of the personal laws of the parties to decide the validity of the adoptive relationship

existing between them is so numerous in the civil law systems.[34] It will be sufficient for our purpose if we give few illustrations from international conventions. The doctrine of cumulation finds support in Article 73 of the Codigo Bustamante of February 20, 1920, ratified by most of the Latin-American countries. It provides that:

> "The capacity to adopt and to be adopted and the conditions and limitations of adoption are subject to the personal law of each of the interested persons."

Similarly, Articles 23 and 24 of the Montevideo Convention of 1940 has this to say about which law should govern the validity of an adoption which has a foreign element:

> Art.23 "Adoption is governed, in so far as relates to the capacity of the persons concerned, and with respect to the conditions, limitations and effects involved, by the laws of the domiciles of the parties, to extent of their mutual conformity, provided that the act of adoption is evidenced by public indenture."
>
> Art.24 "Other juridical questions in which the parties may be involved, are governed by the laws to which the said parties are respectively subject."

The resume of this approach is that whenever the factual elements of an adoption are referrable to different legal systems, its creation raises a question of choice of law involving the application of the personal laws of both the prospective adopter and the person to be adopted.

Before we leave the choice of law approach, it will be pertinent to point out that it has been much criticized by

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34. See e.g. the list of countries cited by Rabel, op.cit., Vol.I, pp.687-691; Rodolfo De Nova, op.cit., p.94 et seq.; K. Lipstein, 12 I.C.L.Q. (1963) 835, at pp. 836-8.

academic opinion[35] not because it is contrary to principle[36] but mainly because it is inconvenient and completely disregards the sociological problems involved in adoptions. For while it is conceded that the cumulative application of the leges domicilii of the adopter and the adoptee for the creation of the adoption means, in theory, that the two relevant laws are being used to effect a change in the status of the parties, nonetheless, what this amounts to is that the adoption must satisfy only the stricter law for its validity. Thus the initial premise that two laws are being cumulatively applied yields ground to the postulate that one law is, in fact, to be considered. For example, if the lex domicilii of the child prohibits adoption whilst that of the prospective adopter allows it, the court seized of the application for adoption must refuse the adoption order, whether or not the grant of such order would have been for the benefit of the infant. Or suppose that the two leges domicilii are not in accord as regards the revocability or non-revocability of the adoption order once made, the severe law must prevail. In the words of Rabel,[37]

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35. See D.P. O'Connell, Recognition and Effects of Foreign Adoption Order" in 33 Can.Bar.Rev. (1955) 633 at pp.639-641; G.D. Kennedy, "Adoption in the Conflict of Laws" in 34 Can. Bar.Rev. (1956) 507 at p. 516; Rabel, op.cit., Vol.I, p.689; O. Kahn-Freund, The Growth of Internationalism in English Private International Law (1960) p.66; A. Ehrenzweig, Am.J.Comp.Law (1960) 548; R. De Nova, op.cit., pp.96-100; Z. Cowen, 12 I.C.L.Q. (1963) 168, 170. But in favour of the doctrine of cumulation are such writers like Beale, op.cit., Vol.II, s.142.2; Cheshire, op.cit., 7th ed. p.381; Graveson, op.cit., 6th ed. p.402; Mann, "Legitimation and Adoption in Private International Law" 57 L.Q.R. (1941) 112 at p.122; and Gareth Jones, 5 I.C.L.Q. 207 at p. 210. It is of interest to note that most of these authors fail to indicate their preference for whether the two personal laws should be applied cumulatively or distributively.

36. See, e.g. the practical explanation of the justifiability of such doctrinal approach made by Prof. Kahn-Freund, op.cit., pp.83-85.

37. Op.cit., Vol.I, p.689.

> "such mechanical addition results in not applying any one of the statutes and in impeding a transaction that all students of juvenile welfare wish greatly to foster."

A second criticism of the cumulative approach proceeds also on the ground of inconvenience. In the words of Dr. Morris,[38] to apply the lex domicilii of the infant in addition to that of the adopter will

> "render adoptions unduly difficult and expensive if proof of domicile were required in the case of infants who are waifs or strays or whose natural parents could not be traced".

This argument must carry weight with the Nigerian private international law since the Lagos Adoption Edict, as the precursor of similar legislations in the rest of the country, only contemplates the

> "adoption of a person under the age of seventeen years who is abandoned, or whose parents and other relatives are unknown or cannot be traced after due inquiry by a ... court". 39

In trying to understand the philosophy of this provision, we may cast a side look at the thousands of children whose parents have perished during the last three years in the Nigerian civil war. Such children are being kept in refugee camps in several centres in Nigeria and abroad. With this factual situation may be linked the proverbial saying that

> "the rights, privileges, duties and obligations of [Nigerian] parents over their children are inalienable" 40.

because of the love they have for their children. In other words, while some Nigerian people will be prepared to adopt other persons' children either because they are childless or because

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38. Dicey and Morris, op.cit., 8th ed. p. 458.

39. S.1.

40. A. K. Uche, Eastern Nigeria House of Assembly Debates (1965) Vol.5, No.1, Column 46.

they consider such transaction as a means of demonstrating the higher ideals of human nature, yet, few parents, if any, will be prepared to give their children away in adoption. Therefore the only range of persons who are being, or would in fact be, adopted in the country are parentless children or war orphans. The Lagos Edict clearly recognises this fact in its provision. So also did this point dawn on the proponents of the Eastern Nigeria Adoption Law[41] which was enacted even before the commencement of the civil war. Therefore, since the persons eligible for adoption in these Nigerian states, as would be in others, are mostly orphans and waifs whose dependent domiciles could only be ascertained by looking at the intentions of their deceased parents, or by arbitrarily fixing such domiciles at the states where the children are to be found, and presumably where the adoptions are to be made, it becomes unnecessary to pursue further the point whether the theory of cumulative or distributive application of the personal laws of both the adopter and the child could be advocated for the Nigerian private international law.[42]

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41. Eastern Nigeria House of Assembly Debates (1965) Vol.5 No.I, Column 991. In introducing the Bill leading to the Eastern Nigeria Adoption Law, the then Attorney-General and Minister of Justice said: "The need for this law arose from the increasing number of delinquent children in the urban areas and large number of orphans in some rural communities. Applications and enquiries continue to be made by individuals and organisations wishing to adopt motherless babies but they cannot do so as there is no adoption law for this Region."

42. We may add for the sake of completeness that the distributive application of the leges domicilii of the adopter and the adoptee has also been condemned. An obvious criticism is that the conditions or the requirements for adoption cannot just be neatly segregated into those touching the adopter and those pertaining to the adoptive child as instanced above. Some requirements will "touch upon or even transcend" both laws and aim at the public morals of the States concerned. For example, one law may permit adoption while the other does not. As a measure of public concern, one legal system may allow adoption by a male applicant, the other may, on the same ground, disallow such adoption. Into which

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In our submission, it is just too impractical. And on this point, we shall let Pennycuick, J., in the English case of Re Valentine[43] have the last say:

> "The relation of parent and child is one of personal status, and it seems to me that on principle /the/ court must regard the law of the adopter's domicile as decisive on the question whether or not this status had been created. This view corresponds, I think, to the realities of the matter. Once an adoption order has been made in any country, the infant is brought up in the adopter's home as part of the adopter's family. In the vast majority of cases, the adopter's home is in the country of his domicile. The whole purpose of the relation created by the order would be defeated if the adoption were not recognised in that country."

2. THE JURISDICTIONAL METHOD

A second approach which is more prevalent with the common law countries, is for provision to be made for a strict and exclusive jurisdiction on adoption. This may be exercised on the basis of the domicile of the adopter or the child as in some common law systems, or on the basis of the nationality of the adopter or the adoptee as in some civil law countries. In addition, the court may be enjoined to, or by its own tacit understanding, apply the local law i.e. the lex fori, which, for choice of law purposes will invariably coincide with the personal law of one of the parties to the adoption. In short, the gist of this approach is that choice of the competent court implies

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42. (continued) category should such conditions be classified since they do not refer directly to any of the parties to the adoption but are matters of state interest. It is such difficulties in the distributive application of the personal laws that prompted Merle, Le Droit International Prive de la Famille en France et en Allemagne, Tubingen - Paris (1955) p.329 to write that the "distributive system is only practical in so far as the substantive conditions of adoption can be clearly related to the person of the adopter or adoptee. But when a condition is common to them both, the choice of a single law is absolutely necessary."

43. /1965/ Ch.226 at pp.233-234.

the determination of the applicable law. Perhaps because of the simplicity of the approach - in the sense that it is unburdened with the application of any foreign law - it is not only widely accepted but it is still on the ascendant in most systems of law. The two varieties of this method are best illustrated by section 1 of the English Adoption Act, 1958 and the practice of the American courts, the result of which is the formulation of the black-letter rule of the Second Restatement of the Conflict of Laws.

In England, the court has jurisdiction to grant an adoption order if

(a) the prospective adopter is domiciled in England or Scotland; and

(b) the prospective adopter and the child are both resident in England.[44]

Some relaxation is made by section 12 of the Act in favour of persons, e.g. British civil servants, businessmen, military personnel, etc. who are domiciled in England or Scotland but who, as a result of the nature of their callings, are resident abroad. For such people, their domicile in England or Scotland alone is sufficient to enable the English courts to assume jurisdiction. Furthermore, if an application for adoption is made by spouses, residence of either of them in England with the child for the trial period of three months, is deemed sufficient for the requirements of section 3 (1) of the English Act.

No specific mention is made of which law should be applied,

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44. Adoption Act, 1958, s.1 (1) and (5). The basis of jurisdiction of the English Courts will be greatly extended when the Adoption Act, 1968 is brought into force. For a detailed discussion on the jurisdictional bases of the 1968 Act, see J. D. McClean and K. W. Patchett, in "English Jurisdiction in Adoption" in 19 I.C.L.Q. (1970) 1.

but the mass rules of procedure which the courts must observe in granting an adoption order leaves little room for the application of any other law than English. In Re B (S) (An Infant),[45] it was held that since the provision as to domicile in the English Adoption Act is directed solely to the prospective adopter, the English courts had jurisdiction to grant an adoption order in respect of a child who was domiciled in Spain but resident in England. It was further held that in exercising jurisdiction, an English court needs only to consider the impact of the child's lex domicilii in arriving at the conclusion as to whether or not the adoption will operate for the welfare of the child. In other words, respect may be paid to the foreign personal law of the child, if known, so as to prevent limping adoptions. But such law has no predominating effect on whether or not the order should be granted. If the order will be for the welfare of the child, the fact that the child's lex domicilii forbids adoption, or that it would not recognise foreign adoptions will certainly be disregarded.

An interesting development in the American jurisprudence must first be noted. Most of the States' statutes on adoption proceed on the basis of "residence" as the jurisdictional requirement which entitles the court of a state to grant an adoption order. Nonetheless, as in the case of divorce jurisdiction, the various States' courts have interpreted the residential qualification to mean that at least one of the parties to the adoption must be domiciled at the forum in addition to the residence or the physical presence of both parties in such

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45. [1968] Ch. D. 204.

state. Hence section 142 of the American Law Institute's Second Restatement of Conflict of Laws[46] provides, following case law, that:

> "A State has judicial jurisdiction to grant an adoption if
>
> (a) it is the State of domicile of either the adopted child or the adoptive parent, and
>
> (b) it has personal jurisdiction over the adoptive parent and over either the adopted child or the person having legal custody of the child."

Thus while the statutes speak of residence, the courts exercise their jurisdiction in terms of domicile on the ground that domicile in the American law has a reasonably constant meaning, whereas residence "is one of the most variable words in the legal dictionary".[47] And the reason for giving jurisdiction to the court of the domicile of either the adopter or the adopted child is explained by the commentator on the Restatement on the footing that if exclusive jurisdiction were confined to the court of the state in which both parties have a common domicile, few adoption orders would be granted and this will be contrary to the overall interest of the American legal systems which aim at the encouragement of legal adoptions, at least interstate.

This slight modification of the traditional power of the domicile to control the creation of adoption by placing desirable emphasis on the sociological advantages of adoption is also the method employed by the Scandinavian countries in dealing with the institution in their private international law. Article 11 of

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46. Tentative Draft No.4 of 1957. See now, S.78 of the Proposed Official Draft, Part 1, 1967.

47. W. L. Reese and R. S. Green "That Elusive Word 'Residence'" in The Symposium on Conflict of Laws, 6 Vanderbilt Law Rev. (1953) 561.

the Convention signed between Denmark, Finland, Iceland, Norway and Sweden on February 6, 1931, provides in the following terms:

> "If a person who is a national of one of the Contracting States and is domiciled in such State wishes to adopt a national of one of the States, the application shall be made in the State where the adoptive parent is domiciled".

Then Article 12 continues by providing that the

> "application shall be dealt with in each State according to the legislation of that State".

Finally, perhaps the most recent example of legal systems which concentrate on the jurisdictional approach, i.e. assume jurisdiction if the adopter has his domicile or his nationality in the country where the application is made and apply the law in force in such country, either as the lex fori or as the personal law of the adopter, is afforded by the Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions. There are twenty-three contracting countries[48] to this Convention, section 3 of which deals with jurisdiction to grant adoption orders. It provides:

> "Jurisdiction to grant an adoption is vested in
>
> (a) the authorities of the State where the adopter habitually resides or, in the case of an adoption by spouses, the authorities of the State in which both habitually reside;
>
> (b) the authorities of the State of which the adopter is a national or in the case of an adoption by spouses, the authorities of the State of which both are nationals."

Thus, by giving jurisdiction to the country of nationality as well as the country where the adopter habitually resides, the

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48. Austria, Belgium, Denmark, Finland, France, Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Luxembourg, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, The United Arab Republic, The United Kingdom of Great Britain and Northern Ireland, United States of America, and Yugoslavia.

Convention strikes a neat balance between those countries which are operating on the principle of nationality and those operating on the principle of domicile as basis of personal law. What the Convention means by "habitual residence" is not defined but it has been suggested by a co-author that this is left to the law of the country making the adoption order to interpret.[49] It probably would be taken by the countries operating the principle of domicile to mean "domicile" shorn of that notorious constituent element - the permanent intention of never leaving. If we are correct on this point, then such meaning will coincide with the definition of domicile suggested for the Nigerian law in chapter two of this work. And to complete the picture, it will be necessary to point out that Article 4 requires the authority which is exercising jurisdiction on basis of nationality or habitual residence of the adopter to apply its domestic law, thereby following the common law approach of applying the lex fori once jurisdiction is assumed.[50]

3. JURISDICTION AND CHOICE OF LAW IN NIGERIA

The next point to consider is how far has due weight been given by recent statutes in Nigeria to the solutions provided by other countries' legal systems and international conventions in

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49. See Graveson, 14 I.C.L.Q. (1965) 528 at p. 534.

50. The Convention, however, makes some concession to the principle of nationality and the doctrine of distribution. Art. 4 (b) directs the authority having jurisdiction by virtue of habitual residence to respect any prohibitions on adoption contained in the lex patriae of the adopter, while art. 5 enjoins the application of the lex patriae of the child in relation to consents and consultations necessary on his part.

dealing with the common problem of international validity of adoptions. To start with, it is gratifying to observe that both enactments on adoption in Nigeria even contain provisions which determine the limits of jurisdiction of the courts.

(a) The Eastern Nigeria Adoption Law, 1965

Section 4 (4) of this Law, the whole of which is deemed to apply in the South Eastern, the East Central and the Rivers states as the specific enactment of each of the states, vests jurisdiction to grant an adoption order in the court solely on the basis of the applicant's and the child's residence in the state where the application is made. With this must be read section 9 of the Law which directs the courts to refuse an adoption order in respect of an applicant who is not a national of Nigeria or, in the case of a joint application, when both applicants are not nationals of Nigeria. In short, only a citizen of Nigeria who is resident, together with the child to be adopted, in the particular state can adopt. For example, a citizen of Nigeria who is married to a non-Nigerian national is bound to have his or her application for adoption rejected if he or she applies jointly with his or her non-Nigerian spouse. This is regardless of the fact that the spouse who is not a national of Nigeria has made Nigeria his or her everlasting home.[51] On the other hand, if the spouse who is a citizen of Nigeria applies singly, the adoption will be granted even though it subsequently

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51. A classic example is that of an Englishman who is married to a Nigerian woman and who because of colour prejudice against his two half-caste children in Great Britain settles in Nigeria with the rest of his family. (The Times, 23rd July, 1968.) If, having decided to make Nigeria his everlasting home, he now applies to adopt one of the war orphans in the Rivers state, for example, his application must be rejected so long as he retains his British nationality!

transpires that the non-Nigerian spouse is the person who exercises effective control and other parental rights over the adopted child!

Of course the problem of choice of law is conveniently swept under the carpet. If a South Eastern state court cannot entertain jurisdiction over a prospective adopter who is resident in the South Eastern state because of his foreign nationality, that determination forecloses the issue as to what the provision of his foreign lex domicilii or lex patriae might have been with regards his capacity to adopt. Neither does it make any difference that the applicant is in fact domiciled in the South Eastern state. At the inter-state level, would a Rivers state court apply the provision of the Lagos state Adoption Edict in determining whether the application for adoption of a Lagos state domiciliary, who is resident with his illegitimate child in the Rivers state, should be granted? To put it in another way, will the Rivers state court say that since the Lagos law, the lex domicilii of the adopter and the child, prohibits adoption of an illegitimate child by his natural parent, such adoption should be refused even though it is permitted by the Rivers state law? It is doubtful if any of the three Eastern Nigeria states, being common law jurisdictions, would burden themselves with what are the provisions of a sister-state or a foreign enactment before deciding the matter. Rather, since the court has jurisdiction by virtue of the Nigerian nationality of the applicant and the residence of the applicant and the child in the state, it seems that the adoption order would be granted by applying the lex fori, regardless of the provisions of the lex domicilii of the parties. The courts' experience in the field of divorce and matrimonial causes conveniently takes care of any suggestion to the contrary. In any event, the provisions

of the Adoption Law are such that no adoption made under it can be vitiated in any of the Eastern Nigeria states where it has been made for failure to apply a sister-state or a foreign personal law of the parties. That any adoption order granted under circumstances described above might not be recognised abroad will be the subject of the last part of this chapter.

(b) The Lagos Adoption Edict 1968

The position under the Lagos Adoption Edict is only slightly better. The Edict also makes residence of both the prospective adopter and the child the condition precedent to the exercise of jurisdiction by a Lagos court.[52] And like the Eastern Nigeria Adoption Law, there is no provision that the court should link this liberal basis of jurisdiction with choice of law as the legal systems mentioned above have done. The Lagos Edict however makes a slight departure from the total discrimination against foreigners employed by the Eastern Nigeria Adoption Law. Instead of prohibiting adoptions by foreigners, the Edict authorises the courts to grant an interim order, which is technically not an adoption order,[53] in favour of an applicant or applicants who are not citizens of Nigeria.[54] This interim order may be made for upwards of six months, after the expiration of which period, the court, in its absolute discretion, may decide whether to make a full adoption order or to continue the interim order for a period not exceeding two years

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52. S.3 (1)(b).

53. S.6 (5).

54. S.7.

altogether. For this period which, in the language of section 6 of the Edict, is a "probationary period", the court will have to decide what are the incidents of such interim order, i.e. whether it includes the obligations on the part of the applicant to maintain, educate or to have the custody of the child. In addition, such order must contain a stipulation that the child should be under the supervision of the welfare officers throughout the period, and a condition that the child must not be taken out of the Lagos state without the prior consent of the court.[55] In all these, the provisions of the Lagos Adoption Edict closely follow similar provisions in the Ghana Adoption Act of 1962.[56] Thus, the discrimination between applicants for adoption who are citizens of Nigeria and applicants who are nationals of foreign countries, even though not as apparent as in the Eastern Nigeria Adoption Law, is still real. A Nigerian national who satisfies the procedural requirements of the Edict can have a full adoption order made in his favour. On the other hand, a foreign national who has no other home besides Lagos and who equally satisfies all the conditions of the statute will only end up with a provisional order which is so hemmed in with stringent restrictions such as his constant surveillance by welfare officers for a considerable time, and his inability to take the child out of the Lagos state, not even to another state in Nigeria where the foreign national may have subsequently settled, without the prior, and of course expensive, authorisation by the Lagos court.

As could be seen, none of the Nigerian statutes adopts

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55. ss.6 and 7.

56. ss.6 and 7.

any of the solutions discussed above for exercising international jurisdiction on adoption. Rather, they ignore problems of private international law entirely, as most such statutes in Africa have done,[57] by asking the courts to assume jurisdiction on basis of residence without telling them to test the validity of a proposed adoption by reference to the personal law of any of the parties thereto. The Nigerian statutes, like the Ghana Adoption Act, are even worse in this respect than those in the rest of the African continent. The courts of the Nigerian states, in exercising their jurisdiction on basis of residence must refuse any application made by non-Nigerian nationals (as in the Eastern Nigeria Adoption Law) or consider the applications of such foreign nationals but make conditions for adoption so difficult that such foreign nationals would consider it worthless pursuing their applications to logical conclusions. Needless to say that this peculiar discrimination against foreign nationals in the field of adoption is repugnant to the generous spirit which under-lies all the other aspects of the Nigerian private international law. Moreover, it is a complete negation of the rules of such body of law.

No pragmatic explanation is given for restricting adoption in the Eastern Nigeria states to nationals of Nigeria or for why the Lagos Adoption Edict makes available to non-nationals of Nigeria mere interim orders, apart from the statement of the

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57. Among those statutes in the rest of common law African countries which base jurisdiction of the court to grant adoption order on residence are, the Adoption Acts of Zambia, Cap.136, s.4(5); Tanganyika, Cap.335, s.4(5); Kenya, Cap.142, s.4(5); Uganda, Cap.19, s.4(5) - Applicant should be a British subject who is resident in Uganda, while the child must be a British subject resident in East Africa, i.e. Uganda, Kenya and Tanganyika; Malawi, Cap. 26.01, s. 3(5). An exception to the general rule is the Zanzibar, Adoption of Children Decree, Cap.55 which provides that the applicant should be domiciled in Zanzibar or in the United Kingdom (whatever that may mean) - s.4(5).

Attorney-General for the former Eastern Region of Nigeria.

> "It will be observed" he said, "that adoption by a non-native of Nigeria is ruled out. This does not mean that the Eastern Nigeria Government is opposed to such an adoption or that an adoption of that nature will not take place. It only means that it cannot be done under our own Regional Adoption Law. The reason for this is that such an adoption raises the question of citizenship which is outside the competence of the Regional Government and is a concern of the Federal Government." 58

This reasoning is not convincing. Much more, it is clearly wrong. The statement confuses a matter of status of adoption, on which the Regional (now state) Government has exclusive power to legislate, with the incident of such status. It is true that nationality or citizenship is a matter within the legislative competence of the Federal Government. It is also true that the nationality or citizenship of a person may be affected by such person's adoption by a stranger in blood. But in our view, nothing in the Federal Constitution of Nigeria prevents any State Government from making adoptions available to nationals of foreign countries who may have sufficient connection with such state while reserving the incidental question as to whether a child adopted by a foreigner in that state takes the nationality of his adopter to the Federal Government. A near analogy is the matter of marriage. Nothing prevents a State Government in Nigeria from providing, as they have impliedly done, that a foreign national may enter into a customary marriage with a Nigerian citizen. The circumstances under which the non-Nigerian spouse acquires Nigerian nationality then becomes the concern of the Federal Government. Furthermore, the division of legislative powers between the Federal and state Governments in

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58. 1965, Eastern Nigeria House of Assembly Debates, Vol.5 No.I Column 45.

Nigeria is almost identical with such division in the federations like Australia, Canada and the United States of America. Yet considerations of a common nationality have never prevented the individual states or provinces in these countries from making their courts available to nationals of other countries who may wish to adopt native children of these places. Indeed, in the final analysis, whether adoption in Nigeria of a Nigerian baby by a foreign national results in the conferment of a foreign nationality on the Nigerian baby depends on the law of the country of nationality of the foreign adopter and not for a Federal or state law in Nigeria to decide. For example, whatever the provision of a Nigerian statute, if a Ghanaian or an English act denies a child adopted outside such country the nationality of Ghana or the United Kingdom, that is the end of the matter. The same considerations govern the acquisition of Nigerian nationality by a foreign child adopted abroad by a citizen of Nigeria. Nigerian law, and not the law of the country where the adoption was worked, decides the issue.

The main reason for refusing the adoption of Nigerian babies to foreign nationals would seem to be the fear that Nigeria might become a baby market for foreign adopters or that such babies might not find good treatment abroad where their adopters may subsequently settle. The fear that Nigeria might constitute baby markets for foreigners, if it actually exists, does not seem to have been based on secure grounds. We have seen that almost all adoption statutes in Commonwealth countries in Africa reject this notion of exclusiveness by making their courts open to foreign nationals who may wish to adopt African babies. The earliest of these statutes was enacted well over a quarter of a century ago while the majority have almost about

twenty years existence. There has not been evidence that these African countries have become baby markets for prospective adopters from foreign countries. There should be no reason to believe that the situation will suddenly change with Nigeria having adoption statutes like other countries in Africa. Secondly, whilst it must be admitted that it might not be desirable to give Nigerian babies in adoption to nationals or domiciliaries of those countries where there is a grosser form, or an official policy, of discrimination against persons on account of race, happily such countries are in the minority and their number is on the wane. But this state of affairs is no justification for making adoptions in Nigeria impossible or more difficult for nationals of <u>all</u> foreign countries. The suggestion later to be made that domicile of the adopter in a state of Nigeria should be the basis of the courts' jurisdiction, coupled with the requirement in the Adoption Statutes themselves that a court, before granting an adoption order, must be satisfied that such order will be for the welfare of the child[59] are, in our view, sufficient safeguards which will enable the courts to refuse adoption orders to foreign nationals or domiciliaries of foreign countries who come to Nigerian states apparently to adopt Nigerian babies away to uncongenial atmosphere abroad. Finally, the point must be stressed that with the immense responsibilities devolving on indigenous Nigerian people as a result of the concept of the extended family, the future of many of the thousands of children orphaned by the last civil war may depend equally, if not more, on the benevolence of foreign

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59. See s. 7(1) of the Eastern Nigeria Adoption Law, 1965 and s. 5(1)(b) of the Lagos Adoption Edict, 1968.

nationals, who are either domiciled or habitually resident in Nigerian states and who are prepared to use the institution of adoption as a means of showing their concern for the plight of such children.

(c) Meaning of "Residence" under both Statutes

We have seen that both statutes employ "residence" as basis of jurisdiction to grant an adoption order. Equally, both fail to define what is meant by residence. Is it synonymous with domicile as in the American law or does it mean something more? Is a visit as a visitor or a mere sojourn enough? What of presence under compulsion or presence under sufferance e.g. when a foreign national stays in Nigeria as a result of temporary permit by the federal Government? On the other hand, should there be, at least, a well settled connection with the state where the application for adoption is being made before the court could assume jurisdiction? If so, how long should the connection be? Should it be merely for the statutory period of three months during which the child is required to live on trial with the applicant? Or should there be a probability that such residence would continue until some considerable time after the adoption order has been granted? Whatever the quantum of the period of residence decided upon, how fatal to such residential qualification should be temporary absences out of the state for business or for convenience? And in the case of a joint application by spouses, how far is it permissible for the uninterrupted residence of one spouse within the state to found jurisdiction when the other spouse is resident out of, or had just ceased his residence in, the state where the application was made?

The above questions, most of which the courts will soon be called upon to answer, show that "residence" is an extremely uncertain word. Indeed, as aptly pointed out in another connection by Alexander, J., in the Lagos case of Onwuka v. Taymani,[60]

> "the word 'resident' and cognate expressions admit of a variety of meanings depending on the intent and scope of the particular enactment in which the word occurs".

For the purpose of the case, the judge defined "residence" as "ordinary residence" - a term which has caused the courts some anxious moments as illustrated by the cases which are interpretative of an identical terminology employed by section 40 of the Matrimonial Causes Act, 1965. Therefore, as used in these two statutes, the term "residence" places upon the courts a difficult task of interpretation. Besides, this seeming difficulty of construction placed upon the courts would seem to suggest that the legislators are unaware of the ambiguities and complexities which the use of the term involves before they make an uncritical adoption of the jurisdictional requirement of other such statutes in Africa without defining it.

Without finding it necessary to repeat what we have already said about the conflicting views expressed in connection with the meaning of residence or ordinary residence as a jurisdictional factor for purposes of matrimonial causes on behalf of a wife, the meaning of residence in connection with judicial jurisdiction to grant an adoption order has already been given in England. It has already been mentioned that in addition to the domicile of the adopter in England or in Scotland, an adoption should not be made, as a general rule, in England unless the

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60. (1965) L.L.R. 62 at p. 75.

applicant and the infant reside in the country. In Re Adoption Application 52/1951,[61] a joint application for adoption of a child, resident in England, was made by spouses both of whom were domiciled in England but who were living in Nigeria where the husband was a District Officer in the Colonial Civil Service. Every 15 months, the husband had a period of leave lasting for about three months which he spent with his wife in England. During the period of such leave in 1951, the spouses bought a house in England intending to reside permanently there after the end of the husband's service in Nigeria. Also during the 1951 leave, they both applied for the adoption of the infant who had lived with them for the trial period of three months as provided by the English Adoption statute. But before the application could be heard, the period of leave expired and the husband had to return to his post in Nigeria, the understanding being that the wife should continue with the application and that she and the child should follow the husband to Nigeria after the grant of the order. As regards the contention of the wife that she was resident in England and that the court therefore had jurisdiction, Harman, J., first observed that it was dangerous to try to define what is meant by residence. However, he came to the conclusion that "Residence denotes some degree of permanence" and that it does not mean that the applicant must have a home in the country where the application is made but that he must have a "settled headquarters" there.[62] Support for this interpretation he found in the definition of residence or "to reside" in

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61. [1952] Ch. D. 16.

62. [1952] Ch.D. 16 at p. 25.

the Shorter Oxford English Dictionary where the word is defined as "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place". These words were quoted with approval by the learned judge. Consequehtly, he held that the wife-applicant and her husband were not resident in England because the parties had always lived in Nigeria and Nigeria was where the wife intended to take the child as soon as an adoption order was granted.

Now, two significant points for the Nigerian law emerge from the above decision of the English court. The first concerns the meaning ascribed to residence as a jurisdictional factor for purposes of adoption in England and the second relates to the means the court employed to ascertain the meaning of the word. In Aderawos Timber Trading Company Ltd. v. Federal Board of Inland Revenue,[63] the Lagos High Court held that when terms used in Nigerian statutes are similar to those used in English statutes and are used in the same context and with the same connotation, the decisions of the English courts interpreting them may be used to construe similar terms in the Nigerian statutes where such Nigerian statutes do not themselves supply some definition. Secondly, in Ashekoya v. Olawunmi,[64] the Federal Supreme Court, the highest court in Nigeria, establishes the rule that the courts may assist themselves in the discharge of their duty of construction of statutes by any literal help they can find, in particular, the consultation of authoritative dictionaries such as, in the words of the court, "the Shorter Oxford English Dictionary". From these two cases, it appears

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63. [1966] (2) A L R Comm. 449 at pp. 457-8.

64. [1962] All N.L.R. 125 at p. 128.

certain that the definition of residence as used in the Eastern Nigeria Adoption Law and the Lagos Adoption Edict will be synonymous with the meaning ascribed to that word by Harman, J., in the above English case. In other words, before the residence of an applicant for an adoption order can be accepted as the basis of jurisdiction by the courts of the Nigerian states having adoption statutes, such residence must involve some degree of permanence. Presumably, the requirement contained in the Lagos Edict that only interim orders which are reviewable after 6 months can be made in respect of prospective adopters who are not nationals of Nigeria, is intended to ensure some reasonable connection between such people and the Lagos state before full orders can be made.

If we are correct on this point, the meaning of residence in these two statutes will approximate the definition of domicile as postulated in chapter two of this work. Since there is no indication that the various law districts in Nigeria are in favour of jettisoning the conception of domicile as being the result of dusty learning, and since adoption is a matter of status which, on principle, ought to be regulated by the law of domicile as in other matters of status such as marriage, legitimacy, succession, etc., it is our considered view that the displacement of domicile as the jurisdictional factor, and for choice of law, in adoption is a gross legislative error on the part of the four Nigerian states. Will it not be better if we adopt domicile with a less exacting definition as the necessary basis of jurisdiction for adoption as well? It is submitted that this should be so. Therefore, with the aim of not allowing conceptual elegance to hinder the creation of the beneficial status of adoption in any of the Nigerian legal units, and at

the same time to ensure that any adoption decreed in such state would be entitled to expect universal recognition outside Nigeria, the jurisdictional rule for creating the status should be formulated for the Nigerian private international law as follows:-

> The court of the state where application for an adoption is made has jurisdiction to grant the order if
>
> (a) the applicant is domiciled in such state or in any other state of Nigeria, and
>
> (b) both the applicant and the child to be adopted are subject to the personal jurisdiction of the court.[65]
>
> In exercising its jurisdiction, the court should apply the provision of the adoption statute in force at the state where the application is made.

It has earlier been suggested that a full faith and credit clause should be incorporated into the Nigerian Federal Constitution or any Federal enactment.[66] We shall also suggest that there should be uniform legislation(s) on adoption by all the various states in the country. Such uniform legislations, even if it involves the enactment of identical laws by each of the states as in the case of the Legitimacy Laws, should include the rule proposed above with respect to judicial jurisdiction. The result will be the uniformity not only of substantive laws but also of jurisdictional rules. Since uniformity of law on a

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65. Compare s. 1(1)(a) of the Adoption Act (Northern Ireland) 1967, which provides that a Northern Ireland court has jurisdiction to make an adoption order in favour of an applicant who is "domiciled anywhere in the United Kingdom, or in the Isle of Man or any of the Channel Islands, and resident in Northern Ireland".

66. See Chapter one.

particular matter within a federation presupposes the interstate recognition of any institution emanating from such law in a particular state, a decree of adoption created by any state in Nigeria will most probably be recognised outside Nigeria since it would be recognised at the state of the applicant's domicile even if it does not constitute the forum adoptionis.

In addition, a jurisdictional factor of domicile, as suggested, will ensure that adoption will be available to a foreign national who had established some reasonable connection with Nigeria by being domiciled in a state of it, even though for political or sentimental reasons, he retains his foreign nationality. Finally, the acceptance of such a jurisdictional base will make it possible for a citizen of Nigeria who is resident abroad, but domiciled in a Nigerian state, to come to Nigeria, live the statutory period of three month's trial period with the child in any Nigerian state, and have an adoption order made in his favour. In other words, if the facts in the English case of Re Adoption Application 52/1951[67] were reversed, with the result that the spouses were citizens of Nigeria who were domiciled in a Nigerian state but working in a Nigerian Embassy or a foreign office, an adoption order would be granted to them on their fulfilment of the statutory period of residence in a state of their choice with the child to be adopted. The fact that they intended to go back immediately after the adoption to the country where they normally resided, or that only one of the spouses eventually saw the application through, would become supremely irrelevant. There is no doubt that such order would be recognised in most countries outside Nigeria. And if, as it

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67. [1952] Ch. D. 16.

is being here strongly recommended, Nigeria adheres to the Hague Convention on Adoption, the chances of Nigerian adoption orders, based on nationality, being recognised in the countries who adhere to the Convention, will become greatly enhanced. Only then may the jurisdictional base of domicile in adoption be extended in favour of non-domiciliary nationals of those countries who adhere to the Hague Convention, since reciprocity will then become the basis of recognition between the member-nations.

C. RECOGNITION OF SISTER-STATE AND FOREIGN ADOPTIONS

Several incidents emanate from the status of adoption the recognition of the efficacy of which may present some acute problems where the factual situation of the adoption are referable to two or more systems of law. A child adopted in a foreign country or a state of Nigeria may assert in any of the other sister-states that he is entitled to succeed to the estate of his adoptive parent or that of his natural parent. He may claim damages for the wrongful death of the adopter under the state's Torts or Fatal Accidents Law as the adopter's child. He may demand that he is entitled to inclusion among those entitled to compensation for injury to the adopter under the Federal Workmen's Compensation Act, or simply, that he is entitled to bear the surname of the adopter. On the other hand, the adopter may assert that he is entitled to the custody of the adopted not only at the foreign country or a sister-state where the child was adopted but also in the particular state in which both are now living. The adopter's claim may be that he

is entitled to the adopted child's services or to succession to his intestate estate as if he were his natural father. The problem to be resolved may be the knotty one as to whether an adopted daughter has capacity to marry the adopter's son in a Nigerian state where both parties are living temporarily, on the ground that their foreign personal law, both at the time of the adoption and at the time of the action, enables them to do so.

In discussing the recognition of sister-state and foreign adoptions in the various states of Nigeria, a distinction should be made between the recognition of such incidents as the child's right to custody, maintenance and education (i.e. those rights which, for convenience, may be described as the child's social welfare rights) and such incidents as the parties' rights of succession or capacity to marry. As observed in the early part of this chapter, scarcely is there any country permitting the institution of adoption in which an adoption, whether effected by a court's order or by private acts of the parties, does not give the minimum rights of care, maintenance and education to the adopted child. This is due to the fact that almost all systems of law in the world now accept the social value of any legal institution whose purpose is to fit any deprived child, whether an orphaned, abandoned or illegitimate child, into a proper family structure. Adoption is one of the means of doing this. Even most countries or legal units having no adoption statutes still maintain that the welfare of such child is of paramount consideration. As already pointed out,[68] provisions that the interest and welfare of the child should be of paramount

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68. See chapter 4.

consideration in all legal proceedings involving his custody and maintenance are to be found in state enactments in Nigeria, even in those states where there are no adoption statutes. Hence it seems certain that the situation will be rare indeed when the social welfare rights of the child conferred by a foreign lex adoptionis will not be recognised in the Nigerian states since, in most cases, such claims are likely to be considered as necessary for the welfare of the adopted child. This should even be so in those states whose laws do not, at present, contain adoption statutes.

Some support for this contention is afforded by such provisions as section 2 (1) of the Lagos Fatal Accidents Act, 1961[69] and section 5 (b) and (c) of the Western and the Mid-Western states' Torts Law, 1959.[70] Both provide in almost identical terms that for the purpose of claiming compensation for the wrongful death of a person under the statutes, an adopted child, whether adopted before or after the commencement of the statutes, in pursuance of a foreign adoption, should be treated as the legitimate child of the deceased adopter and hence entitled to claim as his natural child. The claim of the adopted child seems to have been based in the two Acts on the hypothesis that since the deceased was lawfully responsible for the care and maintenance of his natural children as well as his foreign adopted children whilst alive, compensation for his wrongful death should be available to all his lawful dependants without exception. It is significant that at the time of the

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69. Laws of the Federation of Nigeria and of Lagos, No.34 of 1961.

70. Cap. 122, Laws of Western Nigeria, 1959 ed.

enactment of the statutes, none of the three states which provide for the recognition of the social welfare rights of a foreign adopted child has an adoption statute of its own. Thus, the supposed English law doctrine propounded by Dicey before his death that "a status of a kind not recognised by English law will not be recognised as such in England"[71] has not been accepted as a valid private international law theory in the Western, the Mid-Western and the Lagos states, and is not likely to be accepted in the other Nigerian states.

The main problem of recognition of interestate and foreign adoptions concerns whether an adopted child and the adoptive parents should have mutual rights of inheritance when the law which created the adoptive relationship does not confer such right or vice versa. Or in its more complicated form, should an adopted child be able to inherit from his adoptive parents as well as from his natural parents in pursuance of the lex adoptionis even though the lex successionis only contemplates inheritance through his adopter and the adopter's collaterals alone? Or should, or should not, an adoption be an impediment to the marriage of an adopted daughter and her adopter in Nigeria, when the lex adoptionis does not prohibit such relationship? These inquiries lead, in turn, to another, mainly of classification, as to what law governs the effects or incidents of a foreign-created adoption. For instance, is the relevant law the law governing the succession or the law which created the status of adoption? Secondly, should the concept of adoption as it exists at the lex successionis be identical with the conception of adoption as existing under the lex adoptionis

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71. Dicey, Conflict of Laws, 3rd ed. pp. 502-3.

before it could be recognised? What happens when adoption is unknown to the domestic law of the place where the adopted child claims to succeed to the estate of his adopter? These are some of the questions which create immense difficulties in private international law and as regards which nothing is said in the Eastern Nigeria Adoption Law, 1965. This is not surprising. Indeed, seldom do municipal statutes on adoption contain provisions for recognition of sister-state or foreign adoptions as the case may be, except such rules are contained in international conventions or treaties. Hence this is an area in which case law predominates.

The Lagos state, on the other hand, following few countries like Canada, New Zealand and Kenya, in the common law world, attempts to make the position clear from the outset by the insertion of a rule for the recognition of sister-states and foreign adoptions in its Adoption Edict. But as will presently be shown, this attempt is not completely successful. Section 20 of the Edict provides as follows:-

> "Where any person has been adopted under the law of any part of Nigeria other than Lagos State, or under the law of any country other than Nigeria, the adoption shall have the like validity and effect as if it had been effected by an adoption order under this Edict."

Several points arise for comment about this smooth-looking provision which gives a false impression of simplicity with regard to the question whether the Lagos courts are now obliged to recognise all foreign and sister-state adoptions of whatever nature and of whatever circumstances.

1. MEANING OF SECTION 20 OF THE LAGOS EDICT

The first question of interpretation is, what is meant by the statement that a foreign or a sister-state adoption "shall have the like validity and effect as if it had been effected" under the Lagos Adoption Edict. It seems clear that the only common sense conclusion that could be drawn from the provision is that the words underlined are superfluous and that the courts are merely directed to attribute the same effects as they attribute to an adoption granted under the Lagos Edict to a foreign or a sister-state adoption. The section does not require them to insist that such foreign or sister-state adoption should have been created under identical conditions as a Lagos adoption before it could be recognised. Otherwise, few, if any, adoptions granted out of the state will be found to coincide in all respects with regard to their intrinsic validity with a Lagos adoption.

Of more restrictive effect on the recognition of foreign and sister-state adoptions appears to be section 1 of the Edict which stipulates that the

> "Edict applies only to the adoption of a person under the age of seventeen years who is abandoned, or whose parents and other relatives are unknown or cannot be traced after due enquiry".

Since the adoption of a person whose age is seventeen or more, or who is not abandoned, or whose parents are known has no valid effect in the state, could it, consistently with the section, be argued that such foreign or inter-state adoption should not have any valid effect in the state even though it is valid according to the law of the country where it is created? There seems to be no escape from the conclusion that such adoption will not be

given any valid effect in the Lagos state. But we shall assume that both the positive and the negative answers to the enquiry are correct and therefore consider the implications of the provision in such light.

If we construe the provision to mean that a foreign or a sister-state adoption must be recognised in the Lagos state unless it differs essentially from a local adoption, the result will be that an adoption order granted, for example, to a Rivers state domiciliary by the court of such state under which he adopts his illegitimate child, or the child of one of his relatives, will be denied recognition in the Lagos state. Neither will such order which emanates from outside Nigeria have any effect in the state. In this sense, there is no doubt that the Lagos provision fails to appreciate that dissimilar laws on adoption, though not desirable at the inter-state level, are to be expected within legal systems of the world and that any particular country or state should be wary about concluding that its laws and its public policy are superior to those of other legal systems. Furthermore, if we are correct as regards this view, such provision makes nonsense, at the inter-state level, of the consultations reported[72] to have taken place between the Federal and the State Governments about the need to ensure that the adoption law of one state is in harmony with those of the others and hence lead to easy recognition of adoption orders inter-state.

If, on the other hand, the provision is construed as limited to adoption orders created locally at the State, and therefore inapplicable to adoptions made outside the state, then the

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72. See e.g. Eastern Nigeria House of Assembly Debates, March 1965, Vol.5, No.I, Column 45.

following problems of evasion of law will have to be faced. We have indicated that adoption is differently fashioned in different countries and that the incidents attaching to the relationship differs considerably from one legal system to the other. Section 20 of the Lagos Edict fails to provide a connecting factor[73] which will link the parties to the adoption with the sister-state or the country outside Nigeria where the adoption was created. Therefore, to evade the provision of the edict which forbids the adoption of certain persons, becomes a simple matter provided such evasion takes place outside the Lagos state. For example, a childless married couple, domiciled in the Lagos state, who wants to adopt the child of a living relative, only need to go abroad or to any of the Eastern Nigerian states, adopt the child there after a brief stay and then return to the Lagos state with a ready-made family. Such adoption will almost certainly be recognised under the provision of section 20 if we adopt the second interpretation. The same effect would follow the adoption out of the state of an adulterine child begotten during the monogamous marriage of his father, if the natural father is determined to legitimate the child by adoption in breach of the principle enunciated in Cole v. Akinyele.[74] Thus, by its conflicts rule on recognition of foreign adoptions, the Lagos state makes it possible for its subjects, whether domiciliaries or residents, to commit breaches of the restrictions on adoption imposed by the domestic law, provided that such breaches take place outside the state. That this is not the intention of the legislator is clear enough.

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73. This point is fully discussed below.

74. (1960) 5 F.S.C. 84.

From this analysis of the provision, it becomes clear that whichever of the two interpretations is adopted by the Lagos courts will still lead into difficulties. The first construction denies recognition to foreign or sister-state adoptions if they are not created under identical conditions as a Lagos adoption, and the second, because of the failure of the Edict to provide a connecting factor for recognition, makes evasion of the local law possible. In view of these defects, among others which shall be considered presently, it is submitted that the provision of the Lagos Edict should not be made a standardised private international law rule of recognition in Nigeria.

2. THE CONNECTION FACTOR FOR RECOGNITION OF FOREIGN ADOPTIONS

The second question to be considered is, what connection should parties to a foreign or a sister-state adoption have with such legal district before the adoption could be recognised in a state in Nigeria. Should it be the nationality of the adopter or that of the adoptee or both? Is it the domicile of both or one of the parties, and if the latter, which? Or should the Nigerian private international law cast overboard the concept of connecting factor, or point of contact, and attribute the necessary effects to any foreign or sister-state adoption which had been validly created by the law of the place where it was granted, regardless of the personal law of the parties? We have indicated that the Eastern Nigeria Adoption Law and the rule contained in section 20 of the Lagos Adoption Edict fail to indicate the amount of connection which parties to an adoptive relationship should have with the country or state which decreed the adoption before its order could be recognised. This omission

on the part of the Lagos Edict is undesirable as the above discussion on "evasion of law" has shown. But we may at once dispose of the inter-state problem of recognition by stating that if the suggestion made above is accepted that a full faith and credit provision be enacted by the Federal Government or that a uniform law or identical legislations be enacted on adoption, the problem of inter-state recognition of adoption orders would have been solved. The next question is what connection will suffice at the international sphere, nationality or domicile.

Just as nationality is an inadequate test for determining matters of domestic status in a federation of several legal districts, all of which constitute the same political entity, so also is nationality insufficient, at the international level, for fouhding the jurisdiction of a foreign court, or for indicating the law of which country should create an adoption with extra-territorial effect: more so when such foreign country is also a federation of many territorial areas like the Canadian, the Australian, the American or the Cameroons federation. For example, if we say that only an adoption granted to a Canadian national according to the law of his nationality should be recognised in a Nigeria state, it will be readily seen that such proposition is meaningless in as much as there are as many adoption statutes, differing in provisions, in Canada as there are many Canadian provinces and territories. Furthermore, as we have indicated in our chapter on "Domicile", nationality, without more, does not always represent the community with which a person has the closest connection for purposes of choice of the relevant law that should govern matters of his domestic status, since he can retain his nationality in a particular country despite the fact that he had left it several years ago. In addition, such a person may have more than one nationality.

In the field of family law, the notion is accepted by the Nigerian courts,[75] supported by statutory provisions,[76] that the most intimate contact a person may have with a legal system before such system can be regarded as his personal law is domicile. And in this respect, the Nigerian private international law follows the practice of other common law countries and even some civil law countries which employ the principle of domicile as basis of personal law. Hence the principle is well recognised that any change in a person's domestic status must be accomplished by the law of his domicile at the time of the transaction in question. In the field of adoption, we see no rational justification for why the four Nigerian states having adoption statutes should make an amelioration to this logical basis of personal law in favour of nationality or residence. It is accordingly suggested that just as it has been postulated that domicile should be the test for determining the validity of the adoptive relationship, so also should the principle of domicile be the condition for recognising foreign adoptions. In this respect, it must be pointed out that the same forum-selecting rule suggested for the exercise of jurisdiction by the courts of the Nigerian states should suffice to determine the requirement for recognition of foreign adoptions, i.e. an adoption which has

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75. See e.g. Okonkwo v. Eze (1960) W.N.N.L.R. 80.

76. See, The State's Legitimacy Laws, ss.3 and 9 where domicile is employed as the choice of law requirement for determining the legitimacy of a person; S.101 of the Sheriffs and Civil Process Act, Cap.189, Laws of the Federation of Nigeria (1958 ed.) where domicile is used as the basis of jurisdiction in divorce and matrimonial causes; S.41 of the Administrator-General Act, Cap.4, Laws of the Federation of Nigeria, (1958 ed.) which indicates the law of the "country of the domicile of the deceased" as the relevant law to govern the distribution of the residue of his estate; Order 4, Rule 1 (c), High Court Rules of the Western and the Mid-Western states, Cap.44, Laws of Western Nigeria, (1959 ed.) which enables the court of any of these states to assume jurisdiction in respect of an action concerning its domiciliary who is resident outside the state; and also, s.3 of the

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been granted by the court of domicile of the adopter or recognised by the law of the adopter's domicile at the time of the adoption, should be recognised in Nigeria. In other words, international jurisdiction should depend on the domestic jurisdiction of the courts.

On the other hand, an extension to the domiciliary basis of recognition in favour of nationality between member-countries will be necessary if, as suggested above, Nigeria adheres to the Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions. By becoming a member country, any decree of adoption granted in Nigeria to Nigerian nationals would be recognised, under the convention, by those countries who adhere to it. Similarly, the respective jurisdiction in Nigeria would be bound, under the Convention, to give full recognition to the effects of foreign adoption orders made to nationals of member-countries on basis of nationality.

This suggested rule has some measure of support in section 143 of the American Restatement[77] which provides that an American state should recognise an adoption granted by a sister-state, the court of which assumed jurisdiction on basis of domicile of either the adopter or the adopted child in the state plus the presence of the two parties at the state.

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76. (continued) Probates (Re-Sealing) Decree, No.13 of 1966, which gives power to the state of "domicile of the deceased person" to realise the estate of the deceased in all the sister-states.

77. Of Conflict of Laws, Tentative Draft No.4 of 1957; See also Restatement, Proposed Official Draft, Part III, of 1969, s.290.

In England, the principle of private international law relating to the recognition of foreign adoptions is still in its infancy. The legislature, having provided[78] that adoption orders granted in any of the British Islands, viz., Scotland, Ireland, the Isles of Man and the Channel Islands, should be recognised in England, left the rules for the recognition in the country of foreign adoptions to the general principles of English private international law. Proper rules are yet to be worked out by the courts but all indications point to the acceptance of the lex domicilii of the adopter at the time of the adoption as the basis of recognition of foreign adoptions. In Re Wilson,[79] husband and wife, who were domiciled in England at the relevant time, adopted in Quebec, Canada, a child who, presumably, was domiciled there. Vaisey, J., held that the adopted child could not succeed to the intestate estate of the male adopter in England and remarked that if the male adopter

> "had been domiciled in Quebec at the time when the infant defendant was adopted, the case of the latter would have been different and very much stronger".

In Re Wilby,[80] the joint adopters, husband and wife, were domiciled with the adopted child in Burma at the time of the adoption. The adopters subsequently acquired a new domicile in England where the adopted child died intestate. The male adopter having pre-deceased the child, the female adopter applied for letters of administration as the mother of the adopted child. Barnard, J., ruled against her on the ground that the mutual rights of

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78. See Dicey and Morris, op.cit., 8th ed. p. 471.

79. [1954] Ch. 733 at p. 744.

80. [1956] P. 174.

succession conferred on parties to an adoptive relationship by the English Act of 1950 only applied to a child adopted in England. This case can be conveniently ignored since it was condemned by Harman, J., in Re Marshall[81] and formally overruled by the Court of Appeal in Re Valentine.[82]

In Re Marshall, the question was whether the adopted child of the cousin of a testator who died domiciled in England could succeed as the "issue" of the cousin under the testator's will. Harman, J., said that he would have allowed the claim of the adopted child "because he and his adoptive parent were both domiciled in British Columbia when he was adopted".[83] He, however, refused the claim on the ground that the law of domicile, i.e. the British Columbia law, of the parties at the time of adoption did not confer rights of inheritance on the adopted child as if he had been born in lawful marriage.

The position was carried a stage further by the Court of Appeal's decision in Re Valentine, the most recent of the English decisions on this point. V, a British subject, was resident and domiciled in Southern Rhodesia. From there he went to South Africa to adopt two children, C. and T. who were domiciled and resident in South Africa at the time of the adoption. Under a settlement governed by English law, interests were given to the children of V. The crux of the case was whether C. and T. were the children of V within the terms of the settlement. The Court of Appeal by a majority answered the question in the negative on two grounds. One was that the adopting parents were not

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81. [1957] Ch. 507.

82. [1965] Ch. 831.

83. [1957] Ch. 263 at p.273.

domiciled in South Africa at the time of the order and the second was that the adoption was not recognised by the law of domicile of the adopters at the relevant time, i.e. the Southern Rhodesian Law. The principle was stated by Lord Denning, M.P. He said:

> "the courts of this country will only recognise an adoption in another country if the adopting parents are domiciled there and the child is ordinarily resident there". 84

Presumably in deference to the proponents[85] of the doctrine of cumulation for the English law not only for the creation of the status of adoption but for its recognition, Lord Denning added:

> "You do not look to the domicile of the child: for that has no separate domicile of its own. It takes its parents' domicile. You look to the /adoptive/ parents' domicile only. If you find that a legitimate relationship of parent and child has been validly created by the law of the /adoptive/ parents' domicile at the time the relationship is created, then the status so created should be universally recognised throughout the civilised world". 86

Why the ordinary residence of the child at the foreign country where the adoption was effected was made a condition of recognition by Lord Denning, or the usefulness of such qualification, is not clear. But as regards this, Danckwerts, L.J., who agreed with Lord Denning on domicile, was "not sure". Therefore, what is sure about the English rule of recognition of foreign adoptions is that an adoptive relationship created by the lex domicilii of the adopter, or recognised by that law, will be recognised in England, provided that both the adopter and the

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84. /1965/ Ch. 831, at p. 843.

85. Cheshire, op.cit., 7th ed. p. 386; Graveson, op.cit., 6th ed., p. 403.

86. /1965/ Ch. 831 at p. 842.

child were resident at the place where the adoption was granted. Whether the absence of residence of the adopted child in such place will be fatal to recognition is yet to be seen.

But notwithstanding the uncertain position of the English law on this point, it is submitted that "residence" or "ordinary residence", with its difficulty of interpretation is an inelegant concept in the rule of recognition and that the Nigerian courts should have nothing to do with it.

D. WHAT LAW GOVERNS THE EFFECTS OF FOREIGN ADOPTIONS?

One of the highly debatable aspects of this subject is the question what law determines the effects or incidents of adoption created out of the country or state where its recognition is sought. The problem touches both aspects of the Nigerian private international law at the inter-state as well as the international levels. For although the effects of adoption are uniformly regulated in the four states where adoption statutes exist, we have seen that statutory adoption is not universal in Nigeria. Eight out of the twelve states of the Federation are yet to have such statutes.

The following are few instances of how the choice of law rule to be applied in shaping the rights emanating from the status of adoption created by a sister-state or a foreign country may pose problems for the Nigerian law.

1. A. adopted C in the Rivers State three years ago. C. is now domiciled in the Kano State where A. died domiciled and intestate. C. clears the initial hurdle as suggested above by establishing that his

adoptive parent was domiciled in the Rivers State where the relationship was created, or in another Nigerian state, at the time of the adoption and, hence asserts that the status should be recognised at the Kano State. The Kano court approves of this reasoning but points out that the Kano law does not have an adoption statute and consequently does not provide for any right of inheritance from the adopter in respect of an adopted child. Whereas, the Rivers State's law gives an adopted child inheritance rights. Which law, the Kano law or the Rivers law, decides whether C. succeeds to the intestate estate of A. his adoptive parent?

2. C., the adopted child, was adopted by A. the Adopter, in Botswana at a time when Both C. and A. were domiciled there. According to our proposed rule, since Botswana was the country in which A had his domicile at the time of the adoption, C. should be recognised in the Lagos State as the adopted child of A. But can C. go further and say that because the law of Botswana gives him the right to succeed to the intestate estate of his natural father who died domiciled in the Lagos State, the Lagos court should enforce the right? Which law governs the matter?
3. X. waa adopted in Malawi in 1962. The Malawi law only attributes to the adopted child, rights of custody, maintenance and education, but no succession rights. Is X entitled to succeed to the intestate estate of his adoptive parent who died domiciled in the Lagos

State? Which law, the Lagos law which governs the succession, or the Malawi law which created the status, governs the incident of the adoption in the particular instance.

4. Suppose the facts are as in case 3 above, but the adoptive parent died domiciled in the Western State where there is no adoption statute and where the law of succession is silent on whether an adopted child can succeed on the intestacy of his adopter.

5. O. gave certain property to the "issue" or "children" of P in his will which came into effect in July 1967. The testator died domiciled in the Lagos State. In January, 1966, P. adopted a child, C., in the former Eastern Region of Nigeria. According to both the Eastern Nigeria Adoption Law, 1965[87] and the Lagos Adoption Edict, 1968,[88] the word "issue" or "children" of P. should, unless the contrary intention appears, be construed as, or as including, a reference to the adopted child of P. It may be assumed that there is no such contrary intention in the will. C. claims the right to succeed as the child of P. before a Lagos court. Should the claim be enforced. If so, which law decides the issue; the Eastern Nigeria Adoption Law, 1965, or the Lagos Adoption Edict, 1968, which was not in existence at the effective date, i.e. July, 1967.

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87. s.14 (2).

88. s.14 (a).

The answers to the above hypothetical cases depend on the choice of law rule accepted in Nigeria for determining the effects of foreign or sister-state adoptions. This is a topic which is much canvassed but as regards which statutes and case-law in almost all common law countries speak with different voices while juristic view is far from unanimous. It is proposed to consider three possible solutions to the question, indicating at the appropriate place, the particular solution adopted by the Lagos law. This done, we shall indicate our preference for whichever out of these solutions we consider the best for the Nigerian private international law.

1. The Lex Fori Approach. There are many statements of law to the effect that the court of a particular country or state should attribute the same effects to a foreign or a sister-state adoption as it does to an adoption granted within the forum. In other words, regardless of the rights and duties emanating from the status of adoption according to the law of the place which created it, only such rights as are conferred by the law of the place where the incidents are sought to be enjoyed should take effect.

There is no doubt that this is the approach taken by section 20 of the Lagos Adoption Edict which, as we have seen, directs that a foreign or a sister-state adoption "shall have the like validity and effect as if it had been effected by an adoption under" the Edict. We may illustrate the practical effect of this approach by trying to solve the third hypothetical case above, i.e. the case of a child adopted in Malawi who is claiming rights of succession in Lagos. Despite the fact that

the lex adoptionis confers no inheritance rights, section 20 of the Edict gives the right. Whether or not the adopted child is domiciled in the Lagos state at the time of the death of the deceased is irrelevant. What is of significance is that since the Lagos Edict confers all parental rights on the adopted child, recognition in the state of foreign or sister-state adoptions would rarely cut down, but would often enlarge, the effects of such out of state adoptions.

The Lagos Edict is not alone in going by this approach. This is also the view of the Restatement Second[89] the relevant section of which appears to have been formulated "in reliance on the overwhelming majority of cases"[90] in the American states, though the Restatement is not slow to point out that some courts in the country

> "take the position that the inheritance rights of the adopted child pertain to status itself and hence are governed by the law of the state where adoption was created". 91

Also, some Canadian Provinces have accepted this approach through case law[92] while some others have the principle enacted in their statutes. For instance, the Adoption Act of Nova Scotia[93] provides that an adopted child and his adoptive parents

> "shall have for all purposes in Nova Scotia the same status, rights and duties as if the adoption had been in accordance with the /Nova Scotian/ Act."

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89. Tentative Draft, No.4 of 1957, s.143; See also, Proposed Official Draft, Part III of 1969, s.290.

90. Taintor, 15 Univ.of Pitt.L.Rev.222 at p. 256.

91. Tentative Draft, No.4 of 1957, s.143, Comment a. p.141.

92. See Dicey and Morris, op.cit., 8th ed. p. 473 and the authorities cited in note 18.

93. of 1954, as Revised by the Act of 1967, Cap.2, s.17.

Among the modern writers on Conflict of Laws in the common law world, this approach has the support of Kennedy,[94] Taintor[95] and Morris,[96] the latter of whom finds it "the preferable view" for the English law.

Leaving aside the debatable point whether it is proper to accord more rights to a foreign or a sister-state adoption than are given to such status by the law of its creation, the chief defect of the lex fori approach in determining the incidents of adoption is that it presupposes that the state in which the incident of the foreign adoption is sought to be enjoyed must have an adoption statute of its own. Only then can the effects or incidents of a local adoption be attributed to the foreign status. This condition, in the operation of the doctrine, led to the rather unsatisfactory conclusion reached in some Canadian cases[97] of which the Court of Appeal's decision in Burnfiel v. Burnfeil[98] is the leading authority. In that case, Mr. Burnfeil adopted the plaintiff in Iowa, U.S.A., when he was a child. At the time of the adoption, both Mr. Burnfeil and the plaintiff were domiciled in Iowa. Later the adopter acquired a new domicile in Saskatchewan where he died domiciled. The action was brought by the plaintiff adoptee who claimed, as the child

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94. 34 Can.Bar.Rev. 507 at pp. 534 and 537.

95. 15 Univ.of Pitt.L.Rev. 222 at pp. 263-4.

96. in Dicey and Morris, op.cit., 8th ed., p. 473.

97. Burnfeil v. Burnfeil [1926] 2 D.L.R. 129; Re Donald, Baldwin v. Mooney [1929] 2 D.L.R. 244; Re Skinner [1929] 4 D.L.R. 427.

98. [1926] 2 D.L.R. 129.

of the deceased adopter, to be entitled to the grant of letters of administration. At the time of the death of the adopter, which was the relevant time to determine the child's inheritance rights, there was no adoption statute in the Province of Saskatchewan. But according to the Iowa law, the lex domicilii adoptionis, an adopted child acquired all the rights of a legitimate child including the right of inheritance from the adopter and his collaterals. Faced with the question as to which law should govern the incidents of the adoption, Haultain C.J.S. made the following preliminary observation:

> "An adopted child is an artificial creation unknown to our law. He is not a child in any sense of that term as used in our law. In his case, we have to look to the law of the domicile of adoption to ascertain the rights of succession attached to that relationship, a relationship which our law does not acknowledge, and to which under our law no rights are attached." 99

In short, since the Iowa law gave the rights of inheritance to the adopted child as if he had been born in lawful marriage, the learned judge was prepared to allow him to succeed to the adopter's property in Saskatchewan even though that Province had no adoption statute at the relevant time. But unfortunately, since Dicey,[1] in the last edition of his work before his death, had stated that a foreign adoption ought not to be given effect in a country to whose law adoption is unknown, Haultain C.J.S. bowed to Dicey's opinion and concluded "multo dubitante" that the adopted child's claim failed. He finally expressed satisfaction in the knowledge that such hard decision would not be reached in the future because of the existence of a local enactment on adoption which gave rights of inheritance to locally as

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99. Ibid. at p. 134.

1. Conflict of Laws, 3rd ed. pp. 502-3.

well as foreign adopted children as if they had been born in lawful wedlock. The difficulty, he said, was that the Saskatchewan statute was not retrospective in operation.

The difficulty, if not the impossibility, of operating the "lex fori approach" by a legal system which has no statute on adoption is recognised, but not solved, by the American Restatement on the Conflict of Laws[2] which merely states that

> "It is uncertain what effect, if any,[3] would be given to a foreign adoption in /an American/ state which has no statute providing for the creation of such a status".

Kennedy[4] adverted to the above case but still had the courage to submit that the lex fori approach does no violence to the principle of recognition. Of course, he was aware that if there is no local statute on adoption in the country or state where the foreign status is to be recognised there would be no local incidents which are attributable to the foreign status. But this vital point he dismissed by saying that he was

> "considering the position today when legal adoption exists in almost every part of the world". [4]

In other words, the few remaining places in the world, e.g. the majority of the Nigerian states, which have no adoption statutes should refuse to recognise foreign and sister-state adoptions until they have adoption statutes of their own.[5]

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2. Second Restatement, Tentative Draft No.4 of 1957, s.143, Comment a.

3. Emphasis supplied.

4. 34 Can. Bar Rev. at p. 548.

5. Yet surprisingly, this view has the support of no less an authority than Lord Denning in the recent English case of Re Valentine /1965/ Ch. 831. In his obiter dictum on the point, he considered that when the English law recognises the status of adoption conferred on a child by a foreign law, "It only gives the child the self-same rights and benefits as a child adopted in England by an English Adoption Order", at p. 844.

It follows from the above observation that if the lex fori approach, i.e. the solution provided by section 20 of the Lagos Adoption Edict, is accepted by all the other Nigerian states, all adoptions orders granted in the three Eastern Nigerian states before 21st September, 1968 - the date of commencement of the Lagos Adoption Edict, should not be recognised in the Lagos since it will be impossible for the Lagos courts to attribute the self-same rights they give to a Lagos adoption to such foreign adoptions. Furthermore, all the eight states where there are no statutes on adoption should deny recognition to adoptions obtained in other parts of Nigeria. If only for the harm such approach will cause to several war orphans already adopted in or outside Nigeria, it should be condemned. The Nigerian private international law must be prepared to accept the famous judgment of Cardoso, J., in the New York case of Loucks v. Standard Oil Co. of New York[6] to the effect that:

> "If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff ... We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. Similarity of legislation has indeed this importance: its presence shows beyond doubt that the foreign statute does not offend the local policy. But its absence does not prove the contrary. It is not to be exalted into an indispensable condition."

2. The Doctrine of Equivalence. A second possible approach in the recognition of foreign adoptions is the doctrine of equivalence which is found in the statutes of some common law countries. Representative of such enactments are the New Zealand Adoption Act of 1955[7] and the Kenya Adoption Ordinance of 1958.[8]

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6. (1918) 224 N.Y.99 (New York Court of Appeal).

7. s.17.

8. Cap.143, Laws of Kenya (1962 ed.), s.21.

Ignoring the minor differences between the two statutes, they both stipulate that any adoption valid according to the law of any Commonwealth country[9] where it was granted should have

> "the same effect as an adoption order validly made under [the local statute] and shall have no other effect".

Then both statutes went on to list certain conditions which such foreign adoptions must satisfy before they can be recognised. The first is that the order of adoption must have been granted by a "court of law". In short, an adoption created by deed or other inter-party agreement, even though valid according to the law of its creation, which is also the personal law of the parties at the time of the adoption, will not be recognised in any of these two countries. Whatever the situation might be in New Zealand, this is a surprising requirement to find in the law of Kenya in view of the fact that inter-party adoption is permitted under customary law in certain parts of the country.[10] A second condition common also to both statutes is that the foreign adoption must have conferred on the adoptive parents a right superior to that of the natural parents as regards the child's custody, and a right equal or superior to that of the child's natural parents as regards succession under wills and dispositions inter vivos. The net result of the last condition is that any adoptive relationship created in England before 1950 or in Scotland before 1964 and a host of such relationships coming into force in Uganda, Malawi and some countries in the civil law world, will not be recognised, for example, in Kenya

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9. The New Zealand Act includes the United States of America and other foreign countries.

10. See A.J.F. Simance, "Adoption of Children among the Kikuyu of Kiambu District" in J.A.L. (1959) 33.

in so far as they all fail to confer on the child adopted inheritance rights superior or equal to that of the natural parents! In addition to the above unsatisfactory result, this solution is open to the objection levelled against the lex fori approach in that it, too, proceeds from the premise that both the countries in which the status was created and the one in which its incidents are claimed to be enjoyed, should have adoption laws.

3. The Status Approach. By far the most universal of the solutions adopted by legal systems for recognising foreign adoptions is that which prescribes that the effect of the relationship should, on grounds of logic and convenience, be determined by the law of the country or state which created it. Since we have suggested that the Nigerian law should accept the proposition that the lex domicilii of the adopter at the time of the adoption is the most appropriate law to govern the validity of the status, it automatically follows that this same law should govern the incidents of adoption. There is some measure of support for this approach in English law although it must be admitted that the question is still in doubt. Most civil law countries even where the doctrine of cumulation is being operated for determining the validity of adoption nonetheless determine the incidents of adoption by reference to the personal law of the adopter at the time of the adoption.[11]

The first case to adopt this approach, in the absence of any lead by statute in England, is Re Marshall[12] the facts of

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11. See De Nova, op.cit., pp. 114 et seq.

12. [1957] Ch. 263.

which have already been given above. But briefly put for the purpose of the present discussion, the question was whether a child adopted in British Columbia, at a time when all the parties to the adoption were domiciled in that country, could claim as the adopter's child under an English will. Harman, J., having decided in favour of domicile as the basis of recognition of foreign adoptions, proceeded to the second question as to which law determines the inheritance rights of the child through his adopter, the British Columbia law which created the status, or the English law of the testamentary disposition. The judge decided that whether the child had such right should be looked for in the British Columbia law which created the adoption. If it conferred succession rights, the child must be allowed to succeed under an English will. If it did not, then the claim of the child failed. And in the particular case, since the lex domicilii at the time of adoption did not make the adopted child a full legitimate child for the purpose of inheritance, the adopted child had no succession rights as a legitimate child in England. This was not because such rights were denied by the English Adoption statutes, but because the child had no inheritance rights according to the law which conferred the status on him. The case went on to the Court of Appeal where, unfortunately, the court missed the opportunity presented to state the relevant principle. Instead, it merely refrained from confirming or repudiating the view of Harman, J., in the lower court.[13]

This point was also touched upon by the English Court of Appeal in Re Valentine[14] where the question was whether, and to

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13. See Re Marshall [1957] Ch. 507.

14. [1965] Ch. 831.

what effect, two children adopted in South Africa by a person domiciled, at the time of the adoption, in Southern Rhodesia, should be recognised in England for the terms of a settlement in which property was given to the "children" of the adoptive parent. The court, by a majority decision, held that since the adopter was not domiciled in South Africa at the time of the adoption and since his Rhodesian lex domicilii at the relevant time did not recognise the status, English law should deny recognition to the two children adopted in South Africa. In short, the status was not valid by the lex domicilii of the adopter, and hence ought not to be given universal acclaim. Having answered the first question against the adopted children, it was not necessary for the court to answer the second one as to which law determines the incidents attributable to the status. But in separate dicta, all the members of the court made known their views on the point. Both Lord Denning and Danckwertz, L.J., were in favour of the lex fori approach while Salmon, L.J., was all for the view that the law that created the status must also regulate its incidents. In this respect, he expressly approves of the solution adopted by Harman, J., in Re Marshall[15] and concluded by saying that the

> "nature of the status conferred by adoption must depend upon the laws of the country where the adoption took place". 16

The same conclusion as that of Salmon, L.J., had earlier been reached in the Victorian case of Re Pearson[17] and in the New Zealand decision in Re Brophy Yaldwyn v. Martin.[18] In the

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15. [1957] Ch. 263.

16. Re Valentine [1965] Ch. 831 at pp. 848-849.

17. [1946] V.L.R. 356.

18. [1949] N.Z.L.R. 1006.

latter case, the proper approach to the problem was given as follows:

> "The first step is to ascertain status - namely, whether the relationship of parent and child was validly created. This is a matter governed by the law of domicile. The next step must be to ascertain the attributes of that status - what legal rights and liabilities are incidental thereto. This, too, must depend on the law of the domicile under which the adoption took place." 19

If judicial opinion on the matter in the common law world is divergent, so also are the views of academic writers. Dr. Morris opposes this solution for the English law on the basis that it may produce the

> "surprising result that foreign adopted children would have greater rights than English-adopted children under English settlements, wills and intestacies". 20

Dr. Morris has in mind adoption orders created in England before 1950 under which no rights of mutual inheritance were conferred on the parties to such adoptions. The position has now changed. And for our purpose, we have seen that an adoptive relationship which has been created in any of the states in Nigeria permitting of such institution, puts an end to parental rights and duties and creates a full set of obligations on the part of the adoptive parents. So if this solution is accepted by the Nigerian private international law, there will be no question of any foreign adopted children being able to claim more rights than Nigerian adopted children. But assuming that the position in Nigeria is as argued by Dr. Morris, it must be pointed out that this is a surprising argument for a writer who sees nothing

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19. Ibid. at p. 1017.

20. Dicey and Morris, op.cit., 8th ed., p. 473.

wrong in allowing the incidents of a foreign polygamous marriage to be fully exercised and abrogated in a monogamous country, viz. England.[21] Surely, such laudable suggestion, if fully accepted in England, would amount to the conferment by the English law of greater rights on husbands of foreign polygamous marriages than the English domestic law accords husbands of English marriages. In any event, the recent case of Alhaji Mohamed v. Knott[22] has once again shown the growing internationalism of the English private international law and emphasised the point that English law will not deny the incidents of a foreign status merely on the ground that the attributes of such status are more than an English equivalent.

On the other hand, other writers are almost unanimous in support of the view that the most appropriate law to govern the incidents of adoption is the lex domicilii which created the status itself. For example, Graveson states that

> "incidents of status which are or may be exercised to effect a transaction, such as marriage or adoption, on which a change of status itself may be predicated, are governed by the same law as that governing the status of which the particular incident forms part, that is, in domestic status, generally the law of the domicile". 23

According to Schmitthoff,[24]

> "where the foreign adoption is recognised ..., it has, on principle, the same effect as is accorded to it by the law of domicile of the adopter at the date of the adoption order because it is that law which defines the new status of the infant".

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21. See the Law Commission's Working Paper No 21 of 26/7/68 entitled "Polygamous Marriage" compiled by Dr. J.H.C. Morris, at pp.19 et seq.

22. [1968] 2 W.L.R. 1446.

23. Graveson, op.cit., 6th ed. p.242.

24. The English Conflict of Laws, 3rd ed. (1954) p. 299.

And with regard to rights of inheritance, he concludes that the lex successionis should treat the parties to a foreign adoption

> "as if the adopted person was the legitimate child of the adopter unless it is proved that the law of domicile of the adopter at the date of the adoption order limited the effect of the adoption".

Similar view has also been expressed by Gareth Jones,[25] O'Connell,[26] Rabel[27] and Mr. Justice Scarman.[28] The latter writer correctly identifies, in our view, the process of recognising foreign adoptions when he stated:

> "the court, in any given case must first determine the domicile of the /adopter/[29] at the time of adoption. If the adoption be according to that law, the effect of the act of adoption under that law must then be investigated. If it be to confer upon the person adopted substantially the status of a child born in lawful wedlock, the /law of the country where the incident is demanded/, I suggest, may recognise such a person as such a child ... But, if the foreign adoption does not have that effect according to its own law, there is no reason why it should be given any greater effect" at the place where the status is to be recognised. [30]

Finally, the view that an adoption made in accordance with, or recognised by, the law of the domicile of the adopter must be recognised with its own effects has a significant advantage over the other two solutions. Under this approach, the domestic law of the country or state where the foreign adoption is to be recognised needs not contain a statute on adoption, the incidents

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25. 5 I.C.L.Q. 207 at p.215.

26. 33 Can Bar Rev. (1955) 635 at p. 645.

27. op.cit. Vol.I pp. 704 et seq.

28. 11 I.C.L.Q. (1962) 635.

29. 11 I.C.L.Q. (1962) 635 at p. 640.

30. Ibid., at p. 638.

under which can be ascribed to the foreign status. Such country or state merely ascertains whether the incident claimed is conferred by the law which created the adoption. If so, it allows such incident to have full effect at the forum. If not, it denies the enjoyment of the incident to the claimant. Therefore, the fact that the majority of the Nigerian states have no law on adoption is no bar to the recognition of sister-state and foreign adoptions. Moreover, the "status approach" leaves free the courts to determine the rare cases in which the incident of a foreign adoption e.g. the right of the adopter to marry his adopted daughter, will be repugnant to the public policy of the state concerned, without necessarily closing the doors to the incidents of foreign orders which do not approximate the effects of local adoptions.

It is accordingly suggested that this is the solution which the Nigerian private international law should adopt. And in operating this principle, it should be of no significance whether the foreign adoption was granted by a court order or effected by private act by the parties.

E. CONCLUSIONS

Adoption, whether created by a court decree or by an inter-party agreement which is lawful according to the law of its creation, is an act whereby the relationship of parent and child is created between two persons who are not necessarily related by nature.

In principle, the laws of domicile of the parties to such

relationship have the right to destroy the status between the child and his natural parents and substitute the adoptive parents for the child's natural family, i.e. to confer a new status on the parties to the adoption. But to insist on the law of domicile of the child in the creation of the adoptive relationship in Nigeria is certainly artificial in view of the fact that the preponderant majority of persons who can be adopted in the country are war orphans and waifs whose dependent domiciles cannot be traced except by finding out what the intentions of their parents, who have either disappeared or are dead, are. Therefore, to cater for this sociological phenomenon in the country as elsewhere, the appropriate Nigerian private international rule on the subject should be that only the state or country in which the prospective adopter was, or is, domiciled at the time of the adoption should have the right to create the adoptive relationship or pronounce on whether such relationship which has been created in another jurisdiction is valid.

In order to facilitate the ease of recognition of adoption orders at the interstate level, a uniform adoption law or identical adoption legislations, and a full faith and credit provision, are needed in Nigeria. These will ensure that any domiciliary of a state in Nigeria can obtain an adoption order in another state with the assurance that such an order will be recognised not only in all the sister-states but in most countries outside Nigeria.

Finally, for the interstate and international conflicts, the existence or the nature of the incidents of adoption should be determined by the law of the country or state which created the status. No incident of a foreign adoption should be denied to an adoptive parent or the adopted child unless such incident

is contrary to the stringent public policy of the state in Nigeria where the incident is sought to be enjoyed. The fact that the state where the incident is demanded has no statute on adoption should not be a relevant question for determination.

CHAPTER EIGHT.

ADMINISTRATION OF ESTATES.

1. INTRODUCTION AND TERMINOLOGY.

It is necessary to distinguish clearly between the questions of administration and those of succession since both are not necessarily governed by the same choice of law rules in private international law. Administration is the process of realizing and conserving the assets which make up the estate of the deceased, paying out of them the debts and other claims against the estate, and distributing the residue to those entitled. Succession, on the other hand, involves the sharing by the family of the decedent and his other beneficiaries, if any, of the net balance of the estate after its administration had been completed. In both cases, the person entitled to administer and distribute the estate is the personal representative of the deceased.

Under the general law, the personal representative may either be an executor or an administrator.[1] An executor is a person nominated by the deceased in his will. Nonetheless, the designation of the executor as such must be confirmed by the grant of probate of the will. The grant of probate by the court thus constitutes the authentication of the title which the executor derives from the testator's will. An administrator is normally appointed because of the intestacy of the deceased and he, the administrator, derives his authority from the court's

1. See e.g. the Western Nigeria, Property and Conveyancing Law, Cap.100 (1959 ed.), s.2.

order which appointed him. If the testator made a will but made no provision therein for the appointment of an executor, the court may appoint an administrator with the will annexed (administrator cum testamento annexo). If an executor or administrator, after obtaining a grant, dies, or is allowed to withdraw, the court will appoint an administrator of the estate not yet administered (administrator de bonis non administratis).

Most of these terms may usefully be employed to describe a person appointed under customary law to administer the estate of the deceased person: provided that the following distinctions about administration under customary law is borne in mind. Under this system of law, a testator may also nominate in his nuncupative will, or in his dying declaration, the person who is to manage his property after his death, but his failure to do so, or the inability of the person nominated to act, does not mean that the customary court, or the deceased family members under the traditional law, cannot appoint a representative. The power of the family members to appoint a person who will manage the properties of the deceased before they are distributed, marks the first point of difference between the general law and the customary law on this topic; the second being that whatever the mode of appointment of a personal representative under customary law, there is no distinction in nomenclature between the deceased person's nominee and the person appointed by the customary court or his family members.[2]

A third point which distinguishes the personal representative appointed under customary law from his counterpart appointed under the general law is that the former does not

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2. See Okoro, The Customary Laws of Succession in Eastern Nigeria, p.29; and also Lloyd, Yoruba Land Law, p.287.

become, as the latter, [3] the legal owner of all the properties of the deceased. The range of properties with which a customary law representative cannot inter-meddle includes the deceased interest in a "family property"[4] or his "self-acquired property"[4] which devolves on his children as family property. Such properties cannot be sold by the deceased personal representatives to pay the debts owed by the estate, since they are transmitted automatically on death to the beneficiaries. If any debts remain unpaid, the beneficiaries are personally liable.[5] This is the logical consequence of the customary law rule that whatever the nature of family property, whether a piece of land or a dwelling house, "it is with the consent of all those entitled ... that it can be mortgaged or sold".[6]

In respect of these properties, the position of a personal representative under customary law bears a striking resemblance to that of a civil law personal representative, of which the French system is a good illustration.[7] Both are regarded simply as a person to look after the properties of the

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3. See e.g. ss. 36 (1) and 38 (3) of the Western Nigeria, Administration of Estates Law, under which all the deceased person's real and personal properties are assets disposable by his personal representative for the payment of his debts and administration expenses.

4. For a detailed discussion about the meaning of these terms, see Coker, Family Property Among the Yorubas, 2nd ed., p.75 et seq.

5. Cf. Lloyd, op.cit., p.287.

6. Coker v. Coker (1938) 14 N.L.R. 83 at p.86.

7. See, Pierre and Jean Pellerin, The French Law of Wills, Probate, Administration and Death Duties, (4th ed. 1959) p.36.

deceased, the title to which is already transmitted on death. They may collect rents and profits and assume general managership of the properties until their beneficial successors take them over. If it is necessary for the properties to be sold before they can be shared, it is the beneficiaries who may convey the legal ownership in them. The role of the personal representative is merely to supervise the beneficial distribution of the proceeds of sale.

The only exception to the refusal of customary law to allow an obligatory interposition of a legal owner between the deceased and those who will ultimately inherit certain types of his properties would seem to be in respect of his self-acquired property which devolves as family property on his minor children. Although there is no authority on this point, such property would seem, in principle, to vest in the personal representative during the minority of the beneficiaries and consequently, the representative has a power of disposition or otherwise dealing with it on behalf of the infant beneficiaries.

We have seen that there are several technical terms by which a person administering the estate of a deceased person may be described. In a conflictual situation, these minor differences in terminology and the mode of appointment of such person, either under one system of law or the other, are not important. In the ensuing discussion, therefore, the term "personal representative" will be used interchangeably to describe an administrator or an executor, who was appointed by the High Court, and a person appointed by the customary court, a family council, or other such body, to administer the estate of a deceased person. The only exception is that the use of the term "personal representative" will be qualified as follows: If a deceased person had his

domicile in the country or state where an executor or administrator was appointed to administer his estate, such administrator or executor will be called "principal or domiciliary personal representative".

An understanding of the conflicts problems relating to administration of estates requires some general knowledge of the functions of a personal representative in a purely domestic administration. But before we deal with the topic, it will be necessary, first, to consider the basis of the Nigerian state court's jurisdiction to make a grant of administration.

2. JURISDICTION.

A feature of the High Court Laws of the respective states is that they all contain provisions, whether express or implied, authorising the High Courts to exercise their jurisdiction in probate causes and proceedings in conformity, either with the law and practice in force in England at a certain date or from time to time [8] or, with the jurisdiction being exercised by the High Court of Justice in England.[9] Therefore, a state

8. Express provisions are s. 16 of the High Court of Lagos Act, Cap.80, Laws of the Federation of Nigeria (1958 ed.); s.33 of the Northern Nigeria High Court Law, Cap.49 (1963 ed.); and s.17 of the Eastern Nigeria High Court Law, Cap.61 (1963 ed.). The Eastern Nigeria Law authorises the High Courts of the three Eastern states to follow English law and practice in force on 30th Sept. 1960, in the exercise of their probate Jurisdiction; whereas the Lagos Act and the Northern Nigeria Law provide for the application of the English law and practice "for the time being in force".

9. The Western Nigeria High Court Law (Cap.44) (1959 ed.), and the Mid-Western State, High Court Law, No.9 of 1964, contain no express provisions authorising their High Courts to exercise their jurisdiction in probate causes and proceedings in Conformity with English law and practice, but the same result as in the other states is produced by s.8 of the Western Nigeria Law and s.9 of the Mid-Western State Law, both of which empower the High Courts of the two States to exercise jurisdiction in matters not expressly mentioned in any local enactment in conformity with the jurisdiction being exercised by "Her Majesty's High Court of Justice in England".

High Court is obliged to follow the English common law in making presence of assets of the deceased in the state the basis of its jurisdiction to grant probate of a will or to issue letters of administration in respect of the deceased intestate estate. An added authority for this practice of the High Courts is afforded by the Federal Administrator-General Act [10] and the Eastern and the Western Nigeria Administrator-General Laws.[11] They all follow the common law in enjoining a state High Court to appoint a personal representative viz. the Administrator-General, if the deceased's property is situated in the state and there is no proper person to administer the estate. For the exercise of this power by the High Court, it is immaterial if the deceased was not a national of Nigeria or was not, at the time of his death, domiciled in the state where application for the grant is being made.[12]

But a question on which both the common law and the Nigerian statutes are silent is as to whether domicile of the deceased in the state where the application for a grant is being made is alone sufficient to confer jurisdiction on the court, regardless of the fact that there are no assets located there. The answer to the question would seem to be in the affirmative

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10. Cap.4 Laws of the Federation of Nigeria (1958 ed.) ss.13, 16 (1) (a), 24, 41 and 60 (1). The Act applies to the Lagos and the Northern Nigerian States.

11. Western and Mid-Western States: Administrator-General Law, Laws of Western Nigeria, (1959 ed.), ss.13, 16 (1) (a), 36(1) and 51 (1);
Eastern Nigeria States: Administrator-General Law, Cap.4, Laws of Eastern Nigeria (1963 ed.) ss.13, 16 (1), 39 (1) and 54 (1).

12. See Administration of Estates By Consular Officers Act, (Fed.) Cap.3, Laws of the Federation of Nigeria (1958 ed.) s.2.

by virtue of the Federal Administrator-General Act and the similar Laws of the Eastern and the Western Nigerian states which empower an ancillary personal representative appointed in a Nigerian state to transfer the net assets of the deceased to the principal personal representative "in the country of the domicile of the deceased"[13] for distribution to the persons entitled thereto. If the principal personal representative is entitled to receive the net balance of the deceased's property found in a Nigerian state for distribution to those entitled according to the lex domicilii of the deceased at the time of his death, a fortiori, the state of domicile of the decedent in Nigeria has a reciprocal right to receive from a foreign ancillary representative, assets of the state's domiciliary who died in the foreign country. And unless the state of domicile in Nigeria has power to appoint a personal representative solely on the basis of the last domicile of the deceased in such state, there will be no person charged with the responsibility of distributing the residue of such assets remitted to Nigeria by a foreign ancillary personal representative.

If for this reason alone, it is submitted that the relevant Administrator-General Act or Law impliedly authorises the state in which the deceased person had his last domicile to appoint a principal representative even though the deceased left no assets in such state. This point seems to have been assumed by the Probate (Re-Sealing Decree, 1966, section 3(b) of which provides that the High Court of a state in Nigeria may ascertain "the domicile of the deceased person" before it allows his personal representative who had been appointed in a sister-state or in a foreign country to re-seal his grant at the forum.[14]

13. Administrator-General Act (Fed.) s.41; Administrator-General Law (West) s.36(1) and Administrator-General Law (East) s. 39 (1).

14. The Probate (Re-Sealing) Decree, No.13 of 1966 (Fed.) will be fully discussed below.

Furthermore, it is submitted that presence of the deceased assets in the state, or the location of his last domicile there, should afford the logical basis of the customary court's jurisdiction in situations where such court has power to make a grant.

3. PERSONS TO WHOM A GRANT OF ADMINISTRATION MAY BE MADE.

Besides the point that a testator has an inherent right to nominate who is to be his personal representative, the person to whom grant of administration may be made under the domestic law is the relative of the deceased who, not invariably, also constitutes one of his beneficiaries.[15] Indeed, all State enactments expressly provide that in considering to whom a grant of administration should be made, the court must have regard to the rights and interests of persons interested in the estate of the deceased person.[16] The class of persons, of course, includes the deceased's creditor if there is no proper relative to administer the estate. So in the normal case where a person died in a Nigerian state, leaving one of those rightfully entitled to administer his estate, no problems is encountered. But whenever a person from a sister-state died in the other or a national of a foreign country died in a Nigerian state, and left no person who can administer his estate, then the court of the state where the assets of the deceased are so

15. For a detailed discussion on the entitlement of the deceased next of kin to a grant of administration under the domestic law see, B.W. Harvey, The Law and Practice of Nigerian Wills, Probate and Succession, pp.112-115.

16. Lagos State: Administration (Real Estate) Act, Cap.2, Laws of the Federation of Nigeria (1958 ed.) s.3.
Western and the Mid-Western States: Administration of Estates Law, Cap.1, Laws of Western Nigeria (1959 ed.), s.26(1).
Eastern Nigerian States: Administration (Real Estate) Law, Cap.3, Laws of Eastern Nigeria (1963 ed.), s.3.
Northern Nigerian States: Administration (Real Estate) Law, Cap.2, Laws of Northern Nigeria (1963 ed.) s.3.

to be located has the power to appoint the local Administrator-General as the deceased personal representative.[17] Also, there are treaty arrangements with some foreign countries, viz., Estonia, Finland, Greece, Hungary, Japan, Thailand, Turkey, Yugoslavia and the United States of America [18] whereby a consular officer accredited to Nigeria by the country of which the deceased died a national, may take possession of his properties situated in Nigeria pending his application for letters of administration immediately afterwards. In other words, instead of making a grant in favour of the local Administrator-General, the court of a state will appoint the Consular Officer of the country of nationality of the deceased as his personal representative if such Consular Officer had already taken possession of the deceased properties.

4. FUNCTIONS OF A PERSONAL REPRESENTATIVE.

After the grant of administration, the functions of the personal representative commence. His first duty is to collect the assets of the deceased, whether movables, or immovables or intangible choses in action. And in doing this, he may accept voluntary payments of money due to the estate and give valid discharges for them. If an action is necessary to recover an asset of the deceased, he has the right to sue in his official capacity.

The second duty is for personal representative to conserve the assets thus collected and thereby ensure that they are

17. Administrator-General Act (Fed.), Cap.4; Administrator-General Law (West) Cap.2; Administrator-General Law (East), Cap.4.

18. See Administration of Estates by Consular Officers (Fed.) Cap.3; and for the United States of America, Rules of the Supreme Court, Order 48, Rule 41, Cap.211 Sub., Laws of the Federation of Nigeria (1948 ed.) and High Court Rules (West), Order 33, Rule 41, Cap.44.

safe during the period of his administration. Thus in the case of a business enterprise which must be kept as a going concern before it is passed over to the beneficiary, the personal representative runs the risk of personal liability if he neglects the business and it, as a result, suffers some losses.

Thirdly, out of the disposable assets in his possession, the personal representative is obliged to pay the deceased creditors. In this respect, a creditor of whatever nationality or domicile should be paid on the same order of priority as a creditor who is a national of Nigeria or domiciled in the forum,[19] except that if the estate is being managed by a local Administrator-General, his fees, charges and reinbursements have priority over all other debts of the deceased.[20] The personal representative is also entitled to settle claims which accrued after the death of the deceased. An obvious example is funeral expenses.

Lastly, when the personal representative has completed his administration by paying all debts, expenses and liability incident to the collection, management and general administration of the estate, he is obliged to distribute the residue of the estate among those designated by the deceased in his will or to those entitled according to law in the case of intestacy. His power in this respect is wide indeed. He must pay directly to the beneficiaries if they are readily available at the forum. If the beneficiaries are outside the state in which the personal representative has been appointed, the balance of the deceased assets is, by the Administrator-General Act and

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19. Re Kloebe (1884) 28 Ch.D.175.

20. Administrator-General Act (Fed.) s. 48(2); Administrator-General Law (West) s.43(2); Administrator-General Law (East) s. 46 (3).

Laws, to be remitted to the principal personal representative in the country where the deceased was domiciled, at the time of his death, for distribution to those entitled. Alternatively, such balance may be paid over to the Consular Officer in Nigeria of the country in which the deceased died domiciled for onward transmission to the beneficiaries as determined by the law of such country. Or if the country of domicile of the deceased is a Commonwealth country, the ancillary personal representative appointed in Nigeria may, instead, transfer the surplus of the deceased assets to the Government of such country, if it is willing to distribute the assets to the persons entitled.[21]

There is no doubt that the above statutory provisions are based on the common law principle that it is the lex domicilii of the deceased, at the time of his death, which governs succession to his movable property and that a personal representative appointed by the country of domicile of the deceased is best able to distribute any surplus assets according to the law of domicile.[22] Therefore, the provision of the Federal and state enactments, even though couched with reference to the Administrator-General, must, it is submitted, apply to other persons acting in the capacity of personal representatives in Nigeria. Furthermore, being a statutory adaptation of a common law rule, it would seem that the various statutes, unlike the common law,[23] do not permit an ancillary representative

21. Section 41 of the Federal, Administrator-General Act; s. 36(1) of the Western Nigeria, Administrator-General Law; and s. 39(1) of the Eastern Nigeria, Administrator-General Law.

22. See Re Achillopoulos [1928] Ch.433; Re Lorillard [1922] 2 Ch. 638. The first Nigerian Statute on the point commenced on 1st December, 1938.

23. See Re Lorillard [1922] 2 Ch. (C.A.) 638, where it was held that an ancillary representative appointed in England must not transfer to New York principal representative, the balance of the assets in England so as to enable the domiciliary representative to pay certain creditors whose debts were statute-barred by English Law, but not by New York Law.

appointed in a Nigerian state to concern himself with what the principal or domiciliary personal representative, the Consular Officer, or the Government of the country of the decedent's domicile, proposes to do with the surplus assets transferred for distribution to those entitled. According to the relevant sections,[24] the consent of the domiciliary representative to receive the surplus assets, the receipt of the Consular Officer, or the written acknowledgment by the Federal or State Accountant-General (as the case may be) that he had received the residue of the deceased assets for onward transmission to the Commonwealth country concerned, is, in each case, a full and complete discharge to the ancillary personal representative. Provided that the deceased creditors in Nigeria have been satisfied, an ancillary representative appointed in a Nigerian state will not be liable if he paid over the residue to one of the above persons or Government with the knowledge that some debts, barred by the law of the state of his appointment, but which is still due according to the lex domicilii, remained to be satisfied.

5. THE LAW GOVERNING ADMINISTRATION OF ESTATES.

According to the common law, which coincides in this respect with universal practice, all the functions of the personal representative described above, i.e. collection and conservance of assets, payments of debts and the physical distribution of the residue of the estate, are all matters classified as procedural. They are therefore regulated exclusively by the law of the country where the personal representative derives his authority; in other words, the lex fori.[25] In the words of Person, J., in Re Kloebe[26] "a man who takes out a grant as

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24. Supra, note 21.

25. Preston v. Melville (1841) 8 Cl. & F.1; Re Kloebe (1884) 28 Ch.D.175.

26. (1884) 28 Ch.D. 175 at p.178.

executor or administrator is bound to deal with the property under the grant, according to the law of the country which gives him the grant". The law which governs succession to the deceased's property has no place in regulating how his assets should be administered: neither is the deceased capable of making a prior identification of the law that will be applied in such a case.

But despite these long standing authorities, the distinction between the law which regulates administration and that which determines who should succeed was not appreciated in the Lagos Divisional Court's case of Re Sarki.[27] The sole question arising for determination in the case was whether the stepson of the deceased was a more suitable person, as against the father of the deceased, to administer his immovable (leasehold)[28] property situated in Nigeria. The stepson claimed a prior right to be appointed on the ground that he succeeded to the property by virtue of Syrian law which the deceased had agreed with him should govern devolution of the property. Although it was clear that the deceased was Syrian by origin, it was not clear whether he still had his domicile or nationality in Syria at the time of his death. So it is not clear on what basis Syrian law could have applied to him. All that was known was that he died in Nigeria. The father, on the other hand, claimed that he had a paramount interest in the property according to Nigerian law which governed succession to the deceased's immovable property and hence should be appointed the deceased's administrator.

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27. (1936) 13 N.L.R.20. This case was decided before Nigeria became a federation hence the constant reference to "Nigerian law" rather than the law of a particular former Region or state.

28. At common law, leasehold property or an interest therein is classified as immovable. See Freke v. Lord Carbery (1873) L.R.16 Eq.461.

Graham Paul, J., agreed with the contention of the parties that the real question as to who should be granted letters of administration depends on "whether English law [i.e. Nigerian general law] or Syrian law governed succession to the property". Since only two laws were claimed to be applicable, the simple problem, from the view point of the learned judge, was to make a choice between the Nigerian general law and the Syrian law. On this point, he found that evidence was lacking that there was any agreement that succession to the property should be governed by Syrian law. According to the judge,

> "To oust the application of the ordinary law of succession by agreement would require definite and convincing evidence of the agreement in question". [29]

Since such agreement was not conclusively proved, it was held that the deceased's immovable property "must be administered according to the [Nigerian general law] of succession".

There was no explanation about what made Nigerian law "the ordinary law of succession". Was it because it happened to be the law of the country where the action was commenced, i.e. the lex fori, or because it constituted the law of the location of the immovable property, i.e. the lex situs, or because it was the law of the country where the deceased died domiciled, i.e. the lex domicilii? Rather the judge went on to establish two propositions of doubtful validity. The first is that the person who is entitled to be appointed an administrator in a conflictual situation will be known if the law governing succession to the estate is known. Secondly, the law governing succession to an immovable property of an intestate may be designated by a clear agreement between the deceased and some other person. Had such agreement been conclusively

29. Re Sarkis (1936) 13 N.L.R. 20 at p.21.

proved in the instant case, Graham Paul, J., would have been quite prepared to allow the administration of, and succession to, the deceased's immovable property in Nigeria to be governed by Syrian law. On present authority,[30] the fallacy of a proposition that succession to immovable property is governed by the system of law agreed by the deceased calls for no acumen.

And as regards administration of estates, we have just seen that the various Administrator-General Act and Laws make it obligatory for the High Court of state in Nigeria to appoint the local Administrator-General as a personal representative of a deceased person, who was a national or domiciliary of a foreign country, and who left no proper person to administer his estate in the state. Since the statutes do not enjoin the respective High Courts to consult the foreign personal law of the deceased before deciding to allow the local Administrator-General to act, it becomes clear that the aim of these statutes, all of which were passed after the decision in Re Sarkis,[31] is to follow the common law in determining all matters of administration (including the question of who is entitled to be given a grant) by reference to the lex fori.

Finally, it must be pointed out that the case represents an instance where incorrect analysis of legal problems resulted

30. See Re Whyte (1946) 18 N.L.R.70 and In Re Ogunro's Estate (1960) 5 F.S.C. 137 for the laws governing succession to the movable andimmovable estate of an intestate; and also, George v. George [1964] All N.L.R. 136 and Yinusa v. Adesubokan, Unreported decision of the North-Central State High Court, Suit No.Z23/67 af 30/10/68, for the laws governing testate succession to the movable and immovable property of a deceased person.

31. (1936) N.L.R.20. The Administrator-General Act, which was subsequently re-enacted as their own statutes by the former Eastern and Western Regions, was passed in 1938.

in rules of interlocal conflicts being prescribed for an international conflict. As will shortly be discussed in detail, the principle as regards cases of inter-local conflicts is that the deceased's personal law governs succession to his intestate estate. The same law also determines who is entitled to administer his estate.[32] However, to apply such a rule for the determination of a case having a factual connection with two sovereign countries is not only contrary to authority but is bound to produce disastrous results. For instance, if the law determining matters of administration is made dependent on the law governing succession, it follows that the foreign lex domicilii of a deceased person at the time of his death will not only have to govern succession to his movable property in Nigeria but will also determine other matters of administration, e.g. in what order are the deceased creditors in Nigeria to be paid!

6. CAPACITY OF A PERSONAL REPRESENTATIVE TO ACT OUTSIDE THE STATE OF HIS APPOINTMENT.

(a) Position at Common law.

At common law, no court of a particular country or state has exclusive jurisdiction to appoint a personal representative to administer the estate of a deceased person. Just as the local court has jurisdiction to appoint a personal representative under certain circumstances, so also is it conceeded that other countries or territories where the deceased left property or in which he was domiciled at the time of his death, have concurrent powers to appoint personal representatives for purposes of administration of the deceased's estate. This is the result of the common law principle that the grant of probate or letters fo administration in one jurisdiction, e.g. the Lagos state, does not of its

32. Tapa v. Kuka (1945) 18 N.L.R.5.

own force carry the power of dealing with properties of the deceased situated in another jurisdiction, e.g. the Western state or Sierra Leone. Similarly, a foreign [33] personal representative is not entitled to administer the deceased's estate in the local jurisdiction without the grant of the local court.[34] Otherwise, such foreign personal representative would be liable as an executor de son tort. Thus in Tourton v. Flower, [36] it was held that a personal representative appointed in France had no authority to administer the properties of the French testator in England, merely by virtue of his foreign appointment. While in Finnegan v. Cementation Co. Ltd.,[37] the foreign personal representative who was barred from acting in her representative capacity in the High Court in England was appointed in the Republic of Ireland; the reason being that an Irish grant carried no power of dealing with the right of action accruing to the deceased's dependants under an English statute. However, if the personal representative has been appointed at the country where the deceased was a domiciliary at the time of his death, that factor is sufficient to enable the local court to confirm his foreign grant.[38] But it must be emphasised that this preference

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33. The word "foreign" wherever used to describe a personal representative under this heading should be construed as including a personal representative appointed by a sister-state in Nigeria.

34. Tourton v. Flower (1735) 3 P.Will. 369; Bond v. Graham (1842) I Hare 482; New York Breweries v. Attorney-General [1899] A.C.62; Finnegan v. Cementation Co. Ltd. [1953] 1 Q.B. 688.

35. New York Breweries Co. v. A.-G. [1899] A.C.62.

36. (1735) 3 P. Will. 369.

37. [1953] 1 Q.B.688.

38. In the Goods of Hill (1870) 2 P. & D. 89.

for the foreign domiciliary representative to act as a local representative is discretionary[39] and is made on the basis that it is desirable to have the whole estate of the deceased administered by the same person designated by the personal law of the deceased, despite the several locations of his properties at the time of his death.[40]

The traditional explanation given for the existence of the rule regarding multiple administration is that a personal representative is often a statutory creation and that since the statute of one country or state cannot operate outside the geographical boundaries of such state or country, any personal representative appointed in one jurisdiction is incapable of exercising his statutory functions in another jurisdiction, unless he obtains a fresh grant.[41] Perhaps a less theoretical explanation for the existence of the rule will be found in the concern of each country or state to protect the interests of the creditors of the deceased who are its subjects. This the domestic law is able to do by insisting that properties of the deceased found within the jurisdiction should be set aside primarily to meet the claims of the local creditors. And the only means of achieving this objective is by making it compulsory that a local representative is appointed by, and subject to the control and supervision of, the courts of such jurisdiction. Moreover, such policy saves local creditors the

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39. In the Goods of Her Royal Highness the Duchess of D'Orleans (1859) 1 SW. & Tr. 253, where it was held that an English grant would not be given to a minor even though duly appointed by the deceased foreign lex domicilii under which the minor had full capacity to act with the guidance of a relative.

40. In the Goods of Rogerston (1840) 2 Curtis 656.

41. See Beale, op.cit., Vol.3, p.1533.

expense and trouble of having to travel to a long and distant country of domicile of the deceased in order to prove their claims before a foreign court whose law and procedure may be alien to them and before which their rights may be differently treated. And if the estate of the deceased is insolvent, such a rule guarantees that local creditors would be satisfied first out of the assets in the local jurisdiction before the claims of foreign creditors are met. For whatever the tolerance of the common law in allowing creditors of foreign nationalities and domiciles to be paid pari pasu with local creditors, the operation of such rule must be limited by reason of difficulty of ascertaining who the foreign creditors of the deceased are, and other such practical difficulties. Indeed, the domestic law might have barred their claims, even though such claims may be still open in the foreign country.[42]

Whatever its advantages, the common law rule that a personal representative may neither bring a suit, nor perform any act, in his representative capacity in other jurisdictions except that from where he derives his authority, leads to the absurd result that if a decedent died domiciled in a Nigerian state leaving properties in six other sister-states, six additional grants of administration must be obtained by the domiciliary representative before he could collect the assets of the deceased in the other states. This is on the assumption that the six states would merely confirm the grant obtained in the state of the deceased's last domicile instead of insisting on the appointment of ancillary representatives in all the states. This they are entitled to do at common law. And if, for one reason or the other, they all insist on this procedure, then

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42. As occurred in the English case of Re Lorillard [1922] 2 Ch. 638.

seven personal representatives would be necessary to administer a single estate of the deceased. Much more, such multiple administration would give title in the deceased properties to seven representatives. Especially at the inter-state level, where boundaries are more matters of geographical formality, and where such boundaries can be crossed and re-crossed without let or hinderance, the common law rule makes more difficult, cumbruous and wasteful, the administration of the estate of a person who, at the time of his death, had properties in more than one legal territory.

It is not surprising, therefore, to observe that both the mundane theory of territoriality and the policy of indirect discrimination against foreign creditors of the deceased which underlie the common law rule have recently been discarded for inter-state conflicts and also for international relations with certain foreign countries. But as we shall discover, the statutory remedy is not complete. Therefore, the common law solution is still applicable in certain situations. But first, it is proposed to consider the partial statutory amelioration of the hardships caused by the common law rule before we consider what further improvements should be made.

(b) Position under the Probates (Re-Sealing) Decree 1966.

The 1966 Decree is the most recent of the three statutes passed in Nigeria to eliminate, as far as possible, unnecessary multiplicity of administration of the deceased's estate when such assets are scattered in several territories at the time of his death. One of the earliest Ordinances on this

point was passed in 1936, [43] amended in 1949, [44] and re-enacted in 1958.[45] These early Ordinances all sought to secure a unified administration at the international sphere, i.e. between Nigeria and the "British possessions". It even escaped the attention of the draftsmen of the 1958 re-enactment that the effect of federalism in Nigeria in 1954 was that each of the former Regions (like the new states) became a separate territory for purposes of private international law and that the common law rule regarding multiple administration was necessarily introduced into inter-state relations as a result. This defficiency has now been remedied by the Probates (Re-Sealing) Decree 1966, section 9 of which repealed the 1958 Ordinance.

The most important provisions of the Decree are contained in sections 1, 2 and 6. These sections provide, in effect, that an executor or administrator who was appointed in the High Court of a Nigerian state or the court of a Commonwealth country, either before or after 7th March, 1966, may commence and prosecute an action or proceedings in any High Court of the sister-states, and may also perform in the sister-states other acts in connection with administration of the deceased's estate, in like manner and with the same effect as an executor or an administrator appointed by the High Court of that state. The right to bring proceedings in the High Court of a state or to perform other duties in a representative capacity conferred on

43. Probates (Re-Sealing) Ordinance, No.5 of 1936, repealing the British Colonial Probates Ord. Cap.12, Laws of Nigeria (1923 ed.). The 1923 Ord. made reciprocity the condition precedent to a foreign grant being re-sealed in Nigeria since the Ord. applied to those British possessions which gave the same effects as they gave to local grants to grants of administration issued in Nigeria.

44. Ord. No.17 of 1949.

45. Probates (Re-Sealing) Ordinance, Cap.161, Laws of the Federation of Nigeria, (1958 ed.).

such foreign personal representative is, however, conditional on certain requirements being fulfilled.

First, the probate or letters of administration granted by the foreign or sister-state court must be re-sealed in the High Court of the recognising state. And in order to do this, the original probate or letters of administration, or an authenticated copy, must be produced to the High Court of the state in which the foreign personal representative is to act. Not only that, a copy of such grant must actually be deposited with the court.[46]

Secondly, the High Court of the state where the foreign personal representative is to perform his functions must be satisfied,

(a) that probate duty has been paid in respect of property liable to such duty in the recognising state, [47] and

(b) that a security in a sum equal to the value of the assets to be recovered in the state has been given by the foreign personal representative.[48]

Other conditions which rest on the discretion of the High Court of the recognising state are

(i) that the court may accede to the request of a domestic creditor that security adequate for the payment of the debts due from the estate to all the creditors in that state should be given before the probate or letters of administration could be re-sealed.[49]

(ii) that the court may require evidence of the domicile of the deceased person. [50]

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46. Probates (Re-Sealing) Decree, ss. 1 & 2.
47. Ibid., s. 3 (a).
48. Ibid., s. 3 (b).
49. Ibid., s. 5.
50. Ibid., s. 3 (b).

The last requirement would seem to suggest that what the decree is getting at is that only the personal representative who had been appointed by the court of the country of the last domicile of the deceased should be able to act in a Nigerian state under the provisions of the Decree. If so, it would seem that the purpose of the Decree, i.e. to eliminate all unncessary ancillary administrations, has been achieved, albeit in part.[51] However, a provision enabling only the domiciliary or principal representative of the deceased to perform his official duties in a Nigerian state ought to have been made a compulsory, rather than a discretionary, requirement.

Finally, it must be emphasised that the Decree applies not only to the original personal representative appointed in a foreign country or in a sister-state, but also an administrator de bonis non administratis. This follows from the wording of sections 1 and 2 of the Decree which speak of a probate or letters of administration granted "in respect of the estate of a deceased person".

From the above provisions, it seems clear that the basic philosophy of the Decree is to regard the entire estate of the deceased as a unit and the domiciliary representative as the primary person to administer it, despite the multi-location of the assets of the deceased at the time of his death. In furtherance of this aim, the domiciliary or principal representative, once his grant has been re-sealed by the court of the recognising state, may sue as the local personal representative to recover assets of the deceased situated in the state. Debtors of the deceased in such state may safely turn assets over to him without fear of possible consequences. And the interest of the local creditors are adequately protected by the provision which

51. See below for the shortcomings of the Decree on this score.

requires the domiciliary representative to give security in case he removes the local assets to a foreign jurisdiction without satisfying the claims of such creditors.

Certain points however mar the overall effect of the Decree. One is that it limits a foreign personal representative having capacity to act in his representative role in a Nigerian state to one appointed by "a court having jurisdiction in matters of probate in a Commonwealth country".[52] It is beyond dispute that diversity, rather than uniformity, is a notable feature of the legal systems in the Commonwealth. Of course, it must be admitted that the common law, whether in its pristine condition or its diluted form (e.g., as the "Anglo-Roman-Dutch-Law"[53] of Lesotho, Botswana and Swaziland) serves as a basic or residuary law for them all. But in so far as English law has no special predominance in the Commonwealth, the result of the Nigerian provision is, that if there is a Commonwealth country where court proceedings are not necessary for the appointment of a personal representative, an extra-judicial representative, designated in accordance with the law of such country (even when it is the domicile of the deceased at the time of his death), should be denied the right of representation in Nigeria.[54] In point of fact, this provision indirectly contradicts the relevant sections of the Administrator-General Act and such statutes in

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52. Probate (Re-Sealing) Decree, s.1.

53. This is the term used by Professor Allott to describe the admixture of the English common law and Roman-Dutch law in the above-named countries in Southern Africa. See Allott, "Towards the Unification of Laws in Africa" in 14 I.C.L.Q. (1965) 366 at p.372.

54. In Section 2 of the Probates (Re-Sealing) Act, 1958 (Cap.161), a court of Probate was defined, like in the English Colonial Probates Act, 1892 on which it was based, to include an "authority, by whatever name designated, having jurisdiction in matters of probate". Therefore, if a family council was the competent authority according to the law of the country of appointment of the foreign representative, such person would be allowed to re-seal his grant in a Nigerian state. Now this seems impossible under the 1966 Decree because of the absence of such a definition.

the states.[55] The statutes all empower the federal or the state Administrator-Generals to transfer the surplus or residue of the deceased's assets located in Nigeria, after administration of the estate had been completed, to the "executor or administrator .... as the case may be, in the country of the domicile of the deceased", for distribution to those entitled. As could be seen, none of the enactments makes an appointment by the court of domicile the indispensable pre-requisite to the domiciliary personal representative being able to receive the net balance of the deceased's assets located in the Nigerian state.

Secondly, there is also less reason for limiting the personal representative who may sue and act in Nigeria to those appointed in Commonwealth countries. What happens to such representatives appointed by neighbouring countries like Dahomey, Niger, Togoland and the Cameroons Republic, whose citizens are likely to have more contact with the Nigerian states than most of the Commonwealth countries. Should the burden of administration be made more onerous for the representatives appointed in such countries simply because of the political association to which they belong, even when such personal representatives are quite prepared to give the security necessary for guaranteeing the debts due to the deceased's creditors living in Nigeria? It is submitted that Nigeria should face the reality and stop imagining that a composite State known as the Commonwealth exists, with a common nationality and a common system of law, all of which justify preferential treatment being given to its members. In logic and in reality, there may be more sense in allowing a personal representative appointed in such a non-Commonwealth country like the Niger Republic, Dahomey, Togo, Chad or the

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55. Supra, note 21.

Cameroons,[56] to administer the estate of a deceased national or domiciliary of such country located in Nigeria. This is because of the nearness of these countries to Nigeria and hence the probability that more of their nationals and domiciliaries would die leaving assets in Nigeria. Consequently, many personal representatives from such neighbouring countries will have functions of administration to perform in the Nigerian states. On the other hand, to provide, as the Decree has done, that the principal representatives from such Commonwealth countries, like Canada, Australia, Malaya and Cyprus, among others, shall be able to act in their official capacity in the Nigerian states, merely by presenting their grants, may not be more than the conferment of mere theoretical rights. The distance between these latter countries and Nigeria presupposes that few, if any, personal representatives appointed in such countries will have recourse to collect assets of their deceased nationals or domiciliaries in Nigeria. If it is considered desirable, in the interest of justice, to confer rights of representation in the Nigerian states on the principal representatives from distant countries, then there is no justification for excluding those from countries with the same geographical frontiers with Nigeria simply because of their political grouping. It is of significant interest to observe, in this connection, that Kenya is now in the process of discarding with a similar statutory limitation which confines the re-sealing, in the country, of foreign grants to those obtained in Commonwealth countries. In the words of the Kenya Commission on the Law of Succession, such a limitation

56. Indeed, the Western Cameroon ceased being a Commonwealth member only in October, 1961 and, more important, inherits from Nigeria the predecessor of the Probates (Re-Sealing) Decree, 1966. Consequently, the West Cameroon courts are obliged under the local statute to permit a domiciliary representative appointed in a Nigerian state to re-seal his grant in the territory.

is "out of date".[57] Of course, the Commission also considers it undersirable that only persons appointed by courts of law should be allowed to act in their representative capacity in Kenya.[58]

Thirdly, why should the re-sealing of probate granted by one Nigerian state in the other be limited to a grant obtained in the High Court, when all the customary courts of the states are equally competent to make grants of administration? Is there any evidence to suggest that personal representatives appointed by the customary courts will have no cause to realise a deceased person's assets in more than one state in the country? Or is the failure of the Decree to provide for inter-state registration of grants, or orders, of customary courts another instance of the unwarranted discrimination by the draftsmen of federal statutes against the personnel and, indeed, the very existence of such courts, despite their recognition by the Federal Constitution?

We may summarise the criticisms so far levelled against the Probates (Re-Sealing) Decree thus: A domiciliary representative cannot act in his representative capacity in a Nigerian state merely by producing his grant for resealing in the court of the state if:

(a) he was appointed by an extra-judicial method in a Commonwealth country, even though such method was valid by the law of the country of his appointment;

(b) he was appointed, whether judicially or extra-judicially, by a non-Commonwealth country, notwithstanding the fact that the courts of such country, like the West Cameroon,

57. Report of the Commission on the Law of Succession, para.187 (Kenya).

58. Ibid., s.77 of the Draft Bill on Law of Succession, which is contained in Appendix VI of the Report.

are obliged under a local statute to permit a domiciliary representative appointed in a Nigerian state to act within the jurisdiction of the foreign country merely by producing his Nigerian grant for re-sealing;

(c) he was appointed by a sister-state customary court, the fact that the president of such court was as legally qualified (common law-wise) as a High Court judge notwithstanding.

In these sort of situations, the common law rule of separate administrations under different grants still applies.

The last defficiency of the Act is revealed when an ancillary representative had been appointed to administer the deceased's properties in the local jurisdiction before the domiciliary personal representative, whether from a sister-state or from outside Nigeria, produced his grant for re-sealing. Under such circumstance, the Decree still permits, rightly it is submitted, the grant of the foreign personal representative to be re-sealed, but does not say whether the appointment of the local representative should be revoked or not. Presumably, the court has a duty to do just that so as to prevent multiple administration in the same jurisdiction and the uncertainties that would be created in the minds of the deceased's debtors in the forum as to the proper personal representative with whom to deal.

If the Probate (Re-Sealing) Decree can be amended to remedy the defects listed above, there is no doubt that the Federal Government would have accomplished a worthwhile objective for the Nigerian private international law in decreeing the statute.

7. UNIFIED ADMINISTRATION OF ESTATE WITHIN A STATE.

The last point to be dealt with under the subject of administration is not strictly that of private international law, although it has some bearing on it. It has just been shown that the basic philosophy of the Probates (Re-Sealing) Decree is to regard the entire estate of the deceased as a unit for purposes of administration, regardless of the several locations of the assets making up the estate at the time of his death, and that in furtherance of this objective, the Decree even permits the grant of probate or letters of administration made in "a court" of a Commonwealth country to be re-sealed in any Nigerian state. For purposes of the Decree, it seems clear that such court may be the customary court of Ghana or the Sharia court of Malaysia: Provided that such court has jurisdiction in matters of probate according to its own law.

This state of affairs would seem to suggest that dualism of laws in each of the Nigerian states should not have meant dualism of administration, either locally or inter-state, simply because the assets of the deceased were held under two systems of law. A problem of this nature was presented to the Federal Supreme Court in Lawal v. Younan [59] and it is instructive to observe how easily a court in Nigeria can mistakenly prescribe a private international law remedy for problems of internal conflicts as a result of failure to make a clear analysis of concepts. The inevitable result of such confusion is to produce injustice.

The two deceased persons were, during their life-time, governed by customary law under which they held some properties at the time of their death. Both were killed in a motor accident by the negligence of the defendants. The plaintiffs had previously been given powers to administer the deceased person's

59. [1961] All N.L.R.245.

estates by a Grade B customary court in Western Nigeria. The court had acted under statutory powers. These customary law "administrators" brought an action in the High Court to claim compensation for the benefit of the deceased person's wives and children. The claim was based on the English Fatal Accidents Acts 1846 and 1864, both of which were made applicable in Western Nigeria by a local statute. In short, the realization of the assets comprised in the deceased persons' estates fell to be made both under the customary law and the general law. Under the English Acts, an action must only be brought, apart from the dependants of the deceased themselves, by "the executor or administrator of the person deceased". Therefore, the question which arose for determination by the High Court was whether a person appointed an "administrator" by the state's customary court, in pursuance of its statutory powers, could bring an action for wrongful death in his representative capacity in the High Court of the state of his appointment, without a fresh grant by the High Court being made. On this point the learned trial judge held that since the judgment of the customary court had conferred power on the plaintiffs as the "true and proper persons to administer the estate" of the deceased persons, such judgment or power entitled them under the Fatal Accidents Acts to sue in the High Court in their representative capacity. In other words, the requirement of the English statutes was satisfied if the person suing for wrongful death had been appointed by a competent court in the state.

On this point, among others, the defendants appealed to the Federal Supreme Court which reversed the judgment of the court below. The view of the Supreme Court on this point was given by Ademola C.J.F. Having observed that the customary court

which empowered the plaintiffs to administer the estates of the deceased failed to grant the usual letters or make an order from which it could be deduced what part of the estates should be administered by them, he went on to say that

> "an administration under a grant by a Customary Court differs materially from an administration under the English law [i.e. the general law of the state] which is not applicable or taken cognisance of in an administration under the Customary Law". 60

What material difference there is between a power to administer the deceased's estate granted by a Customary court, and a grant of administration made by a High Court, was not spelt out by the learned Chief Justice. In our submission there is no authority to justify the proposition that the two are not identical in substance. The essence of both is to enable the person designated by whichever court to collect the assets of the deceased, conserve and manage them, pay the deceased debts and see that his dependants get the residue. The fact that the customary courts may not see the necessity for using the same legal formulae usually employed by the English-type courts in issuing their grants of administration, is, in our view, irrelevant. However, on the basis that there is such fundamental difference between the two, the learned Chief Justice held that

> "a person to whom power is given under Customary Law to administer the Estate of a deceased person, is a person empowered by that law to administer the estate of the deceased where Customary law can be invoked, and such power cannot be extended to matters which are statutory rights ..... and to which statutory remedies apply." 61

With these words the Chief Justice turned down the contention of the counsel for the plaintiffs that the efficacy of a grant of administration throughout the courts of a state should not depend on which particular court of the state granted it but on whether the grant had been validly issued according to the

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60. Lawal v. Younan [1961] All N.L.R.245 at p.252.
61. Ibid., p.253.

law of the state. In short the court established the principle that a personal representative appointed by the customary court of a state cannot bring an action in the High Court of that state on the authority of his customary law grant. E converso, two further propositions would seem to follow from this principle of "fundamental difference". The first is that an administrator appointed by the High Court of a state cannot institute proceedings in his representative capacity in the customary court of the same state. Secondly, a personal representative appointed by the High Court of a sister-state cannot institute proceedings in a Western Nigerian customary court, even after his grant had been re-sealed by the Western Nigerian High Court pursuance to the provisions of the Probates (Re-Sealing) Decree, unless he seeks a fresh mandate from the customary court.

There being no prior authority on this point in Nigeria, the Supreme Court rested its decision on the authority of the English Court of Appeal case of Finnegan v. Cementation Co. Ltd.[62] Like the personal representatives in Lawal's case, the administratrix in Finnegan's case brought an action in the English High Court in her representative capacity to claim compensation for the dependants of the deceased on the ground of his wrongful death. Both claims were based on the English Fatal Accidents Acts, which as we have stated earlier, were made applicable to Western Nigeria by a local statute. Both personal representatives owed their appointment to courts other than those in which they sought to commence proceedings. And both failed to take fresh grants before suing in their representative capacity. But there the similarities ended. The administratrix in Finnegan's case was appointed by a court in the Republic of Ireland, which is a foreign country to England

62. [1953] 1 Q.B.688.

according to English rules of private international law; whereas the administrators in Lawal's case were appointed by the Customary Court of the Western state, i.e. the same state in which the High Court was sitting, in accordance with the provision of the state's statute. It is therefore clear that an English decision on a case having factual connections with two different countries ought not to have been allowed to influence the decision of the Western Nigeria High Court on a matter which is purely of a local setting.

Furthermore, both reasons usually adduced to justify the existence of the common law rule regarding separate administrations in different countries are inapt to explain the application of the rule within a single state, whatever the degree of multiplicity of laws, or dualism of systems of courts, in such state. The accentuated territoriality doctrine is inapplicable since the administrator who was disbarred from pursuing a claim in the High Court was appointed under the law of the same state, albeit by another type of court. Protection of local creditors cannot be a reason since the deceased creditors in the state could have recourse to a representative appointed by whichever court within the state.

The only practical result of the amazing decision in Lawal v. Younan [63] is the economic dissipation of the assets of the deceased persons instead of assisting the customary law representatives to consolidate them for the benefit of the eleven wives and twenty children of the deceased. It will be of interest, in this respect, to observe that the customary law administrators were ordered to pay 430 guineas as legal costs - an amount which would certainly be paid out of the meagre estate of the deceased. In such a circumstance, it becomes obvious that

63. [1961] All N.L.R.245.

the only persons who benefitted were the disputants' counsels and attorneys.

Not surprisingly, this Western Nigerian case appears to the rest of the Nigerian states as nothing but a mechanical application of an English rule of private international law to a problem of internal conflicts - an alien conception to English law - without appreciating the policies which necessitated the enunciation of the rule by the English courts. Moreover, it appears to have been thought that there is no logical basis for a rule whose ultimate result is the deprivation of the children and wives of a deceased person of the meagre assets which are theirs by right in a society which believes in devolution of properties on death on the descendants of the deceased. For instance, the Fatal Accidents Act [64] of the Lagos State, which was enacted three months after the decision of the Supreme Court in Lawal's case, defines "administrator" for the purpose of the Act as including " a person appointed according to any system of customary law as representative of a deceased person or his estate", [65] while both the Eastern and the Northern Nigerian Fatal Accidents Laws allow "person or persons ..... empowered to represent the deceased person or his estate according to ... customary law" [66] to sue in their representative capacity in the High Courts. In addition, the Eastern and the Northern Nigerian statutes even allow a customary law personal representative the choice of the most convenient forum between the High Court, the Magistrate's or District Court and the customary court.[67]

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64. No.34 of 1961.

65. Ibid., s. 2 (1).

66. For Eastern Nigerian States, See Cap.52, Laws of Eastern Nigeria (1963 ed.) s.4 (1) (b); and for the Northern Nigerian States, see Cap.43, Law of Northern Nigeria (1963 ed.) s.4 (1) (b).

67. Ibid., s. 9.

Only in the Western and the Mid-Western States where dualism of administration was sanctioned by the Federal Supreme Court's decision in Lawal's case has such a remedial legislation not been passed. But the above remarks about the unfortunate result of the decision would have conclusively shown that such statute is long overdue. If the policy of the Federal Government concur with that of the states in substituting, at the inter-state and international spheres, a unified administration for a diversified one, on the basis that the deceased person's heirs and beneficiaries are entitled to demand an inexpensive administration of the estate as is possible, and so as to ensure that they receive more of the deceased's properties, then commonsense and justice demand that all systems of laws in Nigeria should reflect this policy. In other words, a customary law personal representative should be able to act not only in the High Court of the state of his appointment, but also in that of any sister-state in Nigeria, if necessary. The only situation in which a qualification should justifiably be made to this rule is when a customary law representative is completely incompetent to perform the duties of administration. Furthermore, this general rule should not be a one-way traffic. A personal representative appointed by the High Court should be able to act in the customary courts, without seeking fresh grants, if proceedings in such courts are necessary to recover the debts owed to the estate of the deceased.

CHAPTER NINE.

SUCCESSION.

1. PROBLEMS OF DICHOTOMY OF SYSTEMS OF LAW.

An attempt to answer the question, which law governs succession to estate of the deceased raises a variety of problems in Nigeria. These legal problems are the result of (a) the fact that Nigeria is a federation of many states, each of which constitutes a territorial unit for the enactment of its own laws on succession, as in most matters of family relations: (b) the co-existence, in each state, of the system of customary law with that of the general law, which is made up of the common law and statutes; coupled with the fact that each system of law determines matters of inheritance differently from the other; and (c) the fact that within a single state, there may be as many bodies of customary law as there are ethnic groups, thereby giving rise to multiplicity of laws within the same territorial legal unit. It will not be surprising to note that the following variety of conflicts of laws arise as a result, regardless of whether or not the deceased made a will.

(a) Internal Conflicts:

The choice of the applicable law to govern succession to the properties of the deceased person may, at the local level, depend on a variety of factors even when the decedent had no contact with more than one ethnic group throughout his life-time and such ethnic grouping

is co-terminous with the geographical boundaries of a state. An obvious example of this sort of situation is when a Yoruba man lived his whole life, and died intestate, in the Western state where only one ethnic group, the Yoruba, is to be found. In such situation, the answer to the question as to whether his intestate estate should devolve according to the Yoruba customary law or the general law of the state may well depend (i) on the type of marriage contracted by the deceased. Thus in all the Nigerian states, the marriage of a decedent native in a monogamous form removed the administration of, and succession to, his estate from the operation of the state's customary law or laws, and brings them under the state's general law, notwithstanding the fact the deceased was throughout his life subject to customary law.[1] (ii) In the Lagos state alone, the applicable law will be the general law if the deceased was the issue of a monogamous marriage even though he himself contracted a polygamous marriage.[2] (iii) The deciding factor in determing whether one or the other system of law governs devolution of the estate may be neither of the above two tests, but the nature of the property left by the deceased. Thus assuming that the decedent was not the issue of a monogamous marriage and did not himself contract a

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1. For the Western and the Mid-Western States, see section 49(5), Administration of Estates Law, Cap. 1, Laws of Western Nigeria, (1959 ed.); Lagos State, s.36 of the Marriage Act, Cap. 115, Laws of the Federation of Nig. (1958 ed.); and for the rest of the States, Cole v. Cole (1898) 1 N.L.R. 15 and Administrator-General v. Egbuna (1945) 18 N.L.R. 1.

2. Marriage Act, s.36; Bamgbose v. Daniel [1955] A.C. 107 (P.C.).

monogamous marriage, nonetheless, if he left such assets as company shares and Government securities which are transferrable only by registration, or some negotiable instruments, the collection and distribution of such assets must be governed by the general law since such assets are unknown to customary law.[3] This factor (the nature of the property) may result in making both the general law and the customary law of the state concerned applicable concurrently, not only as regards administration but as to who should succeed to the estate.[4] (iv) Alternatively, the choice of the applicable law for determining matters of inheritance may be made by using the test of the deceased person's manner of life or his position in society during his living life.[5]

If the deceased made a will, then the choice of the applicable law between the general law and the customary law depends on the intention of the testator as could be gathered from his will in which he might have employed a common law terminology to devise what smacks of a customary law property interest. Thus in one case,[6] a testator devised his real estate to twelve named persons, "their heirs and assigns for ever as tenants in common without any power or right to alienate or anticipate the same or

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3. Cf. Giwa v. Otun (1932) 11 N.L.R. 160 at p.161; Lawal v. Younan [1961] All N.L.R. 245

4. Lawal v. Younan [1961] All N.L.R. 245.

5. Smith v. Smith (1924) 5 N.L.R. 105 at p.108; Ajayi v. White (1946) 18 N.L.R. 41.

6. George v. Fajore (1939) 15 N.L.R. 1

any part thereof". It was held that notwithstanding the use of the words "tenants in common" which has a precise meaning at common law, the intention of the testator was to create a family property which is a concept of customary law. Therefore, that law, and not the general law, governed the succession to the property. From the reasoning in the case, it isclear that the making of a will in an English form to devise property does not necessarily import the application of the English common law or a statute based on English act of Parliament to govern the devolution of the estate comprised in the will. Certainly, the distribution of the estate will be governed by the customary law if the testator designated such law or expressly created a family property.[7] Moreover, if the deceased was a Moslem subject to Moslem law, he can only devise the disposable part of his estate as determined by Moslem law. The fact that he complied with the provision of the Wills statute does not entitle him to devise away the compulsory share allocated to his next-of-kin by Moslem law.[8]

(b) Interlocal Conflicts:

When the conflict is interlocal, i.e. between two or more ethnic groups within the same territorial unit e.g. between the Urhobo and Ishan customary laws

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7. Jacobs v. Oladunni Bros. (1935) 12 N.L.R. 1 ; Coker v. Coker (1939)14 N.L.R. 83; Ayoola and Balogun v. Folawiyo (1942) 8 W.A.C.A. 39.

8. Yinusa v. Adesubokan, Unreported decision of the North Central State High Court, No. Z23/67 of 30/10/68, per Bello J. Contra: the dictum of Ames J., in Apatira v. Akanke (1944) 17 N.L.R. 149 at p.151.

in the Mid-Western state, the determination of which of the two customary laws should govern matters of inheritance on death depends on the ethnic group of which the deceased was a member at the time of his death. The customary law of this locality governs succession to the deceased's estate in the Western, the Mid-Western and the Lagos States as the "customary law applying to the deceased" on the authroity of section 20(2) of the Western Nigeria Customary Courts Law.[9] No distinction is made as regards the applicable law even when the inheritable property is an immovable property, e.g. land.[10] Neither is it of any significance whether the deceased died testate or intestate. Indeed, the statutory provision merely follows case law and therefore accords with the principle operating in the rest of the federation on the authority of Tapa v. Kuka.[11]

In the Northern Nigerian States, statutory backing has even been given to the rule of customary law that succession is governed by the personal law

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9. Cap. 31 (1959 ed.) This law now applies to the Lagos State by virtue of the Lagos State (Applicable Laws) Edict, No. 2 of 1968.

10. Except that the lex situs may restrict the right of the beneficial successor to occupy the land, as opposed to a deprivation of his other beneficial interests, e.g. the right to receive the proceeeds of its sale. See s.20 (4) Western Nigeria, Customary Courts Law, Cap.31.

11. (1945) 18 N.L.R. 5, where it was held that the personal law of the deceased in the sense of the customary law of his tribe at the time of his death, decides who is to administer his estate. This decision is based on the prior analysis that the deceased person's personal law not only governs succession to his immovable property, but in addition, decides the degree of relationship and in what order his relatives are to succeed; and that grant of administration should normally be made to a person designated by such law as having a beneficial interest in the property.

of the deceased as regards devolution of his immovable properties as well as the movable ones. The Land Tenure Law,[12] at section 30, provides that

> devolution upon death of land situated in the Northern Region of Nigeria, shall be regulated, in the case of a native, by the customary law "existing in the locality in which the land is situated" and,, in the case of a non-native, by the customary law "of such non-native at the time of his death relating to the distribution of property of like nature".[13]

According to section 2 of the Law, a "native" is defined as a person whose father was a member of any tribe indigenous to Northern Nigeria". Since the word "Region" (or "Northern Nigeria" when used in any enactment to describe the former Northern Region of Nigeria) must now be construed as a "State" created under the States (Creation and Transitional Provisions) Decree, 1967[14] it follows that the words 'Northern Nigeria" as used in section 2 of the Land Tenure Law should not be construed as"a State in Northern Nigeria". Furthermore, since the Land Tenure, enacted by the former Northern Region of Nigeria is now deemed to be the enactment of each of the six States created out of the former Region, it also follows that the words "any tribe indigenous to Northern Nigeria" in section 2 of the Law should be construed as "any tribe indigenous to the particular State in Northern Nigeria whose land Tenure Law is being considered."[15]

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12. Cap. 59, Laws of Northern Nigeria (1963 ed.)

13. The section is slightly re-phrased to make it more lucid.

14. No. 14 of 1967, s. 7 (1) and (2) as amended by the States (Creation and Transitional Provisions) (Amendment) Decree, No. 19 of 1967.

15. The effect of the States Creation Decrees on the Northern Nigeria, Land Tenure Law seems to have escaped the attention of Bello, J., in Yinusa v. Adesubokan, Unreported decision of the North Central State High Court, No. Z23/67 of 30/10/68. In that case he held that a native within the purview of the Law means a person whose father was a member of a tribe indigenous to the Northern States.

The clear effect of section 30 of the Land Tenure Law in the light of the recent constitutional development is that when the choice of the applicable law to govern succession to land is to be made between two or more customary laws existing within a Northern Nigerian State, and the deceased was a member of a tribe indigenous to that State, then the relevant law is the customary law existing in the ethnic community in which the land is situated. But when the land which is situated in such Northern Nigerian State is the property of a deceased person who was not a native of a tribe within the state, then succession to such land is governed, not by the lex situs but by the customary law of the ethnic community to which the deceased belonged "at the time of his death". One point must be emphasised about the provision of the Northern Nigerian states Land Tenure Law. The lex situs rule is new. Indeed, the statute was itself passed only in 1962. Therefore, the influence of the common law here is not concealed.

As section 30 of the Land Tenure Law of the Northern Nigerian States has acknowledged, problems of interlocal conflict may cut across state boundaries and involve a choice between the customary law of one ethnic community within one state and the customary law of another etchnic community within a second state. It might be more appropriate to designate such conflict as "inter-state" but we should be wary to use that term to describe such a situation since the problem does not involve the whole territorial law of one state being in conflict with the other. Be that as it may, the personal law of the deceased still governs succession to all his

properties, both movable and immovable, despite the fact that the diversity of laws cuts across territorial boundaries.

Thus in Tapa v. Kuka, [16] a Moslem who was a native of Bida (now in the North-Western State) died intestate leaving a house in Lagos. It was held by Brooke, J., in the Supreme Court that the Moslem law prevailing among the Nupes of Bida, and not the customary law of Lagos where the land was situated, governed the beneficial succession to the house. Consequently, the Moslem personal law decided the question as to whom a grant of administration should be made. Although it must be pointed out that this decision was given before Lagos and the North-Western States became separate legal districts, it is obvious that the "foreignness" of the Nigerian States to one another does not alter the position. Indeed, there are statutory provisions passed after regionalisation which emphasize the point that the systems of customary law do not accept the omnipotence of the lex situs so far as succession to immovable property is concerned. For instance, nine out of the twelve Nigerian states have almost identical statutes providing that:

> Where the customary law of the ethnic community in which land is situated restricts or prohibits the rights of any particular classs of persons, to occupy such land, or provides that the land may devolve on a particular class of persons, such restriction, prohibition, or rule regarding devolution on a particular class of persons, "shall not operate to deprive any person of any beneficial interest in such

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16. (1945) 18 N.L.R. 5

land (other than the right to occupy the same), or in the proceeds of sale thereof, to which he may be entitled under the rules of inheritance of any other customary law". 17

The above provision has an interesting historical antecedent. It is pointed out by Mr. Marshall, the former Legal Secretary to the Government of Northern Nigeria, that Northern Nigeria was the first legal district in Nigeria to enact the above provision. It was inserted in the Native Courts Law as a result of a Northern Nigerian case concerning succession to the estate of an Ibo person who died leaving land in Northern Nigeria. According to the Ibo personal law of the deceased at the time of his death, a woman relative of the deceased succeeded to the land. But according to the law of the locality where the land was situated, women were not allowed to occupy such property. A compromise decision was therefore reached that the property should be sold and

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17. See s.20(4), Western Nigeria Customary Courts Law, Cap.31, which, as we have said above, applies in the Western, the Mid-Western and the Lagos States; s.30(a) of the Land Tenure Law, Cap. 59, Laws of Northern Nigeria (1963 ed.) which, as we have also pointed out, applies in all the six states carved out of the former Northern Region; and the identical s. 21(2) of the North-Western State, Area Courts Edict, No.1 of 1967; Kwara State, Area Courts Edict, No.2 of 1967; Kano State, Area Courts Edict, No. 2 of 1967; North-Central State, Area Courts Edict, No. 2 of 1967; North-Eastern State, Area Courts Edict, No. 1 of 1968; Benue-Plateau, Area Courts Edict, No. 4 of 1968.
This provision has been slightly re-phrased because of its unhappy wording in all the enactments. For example, the Western Nigeria provision reads thus:

"Where the customary law applying to land prohibits, restricts or regulates the devolution on death to any particular class of persons of the right to occupy such land it shall not operate to deprive any person of any beneficial interest in such land (other than the right to occupy the same) or in the proceeds of sale thereof to which he may be entitled under the rules of inheritance of any other customary law".
There is no indication as to how the phrase underlined, i.e. the customary law applying to land, should be determined. Is it by reference to the situs of the property or to some other criterion? A reading of the whole

(Continued on next page)

the proceeds of sale paid over to the female successor. Though unreported, the principle of the case is preserved for posterity in the above provision, which, as we have stated, has a counterpart in the enactments of most of the Nigerian states.

(c) Inter-State and International Conflicts:

A further complication, with which we are here mainly concerned, may be introduced by the deceased leaving properties scattered about some of the states of the Nigerian federation and one or two foreign countries. Such properties need not be extremely large before we encounter this sort of problem. Even a moderate-sized estate may be made up of enterprises, interests and other properties which are spread over a number of territories, all of which the deceased had managed as an integral whole during his life-time. Thus for example, certain debts may be owed to the estate at the Kano State, a right of action for wrongful death might have accrued in the Western State under the state's Torts Law, a life insurance policy has matured in the Lagos State, some shares

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(Footnote 17 continued from previous page)

section 20 of the law, especially s. 20(1) which provides that "In land matters the appropriate customary law shall be the customary law of the place where the land is situated", clearly shows that the lex situs is meant. The above provision is to delimit the role of the lex situs when succession to land is governed by a different personal law of the deceased as stipulated by s. 20(4) of the Law. In this respect, the terminology which we adopt in the text to express the intention of the Law, appears more lucid.

Notwithstanding their unhappy wording, the meaning of the provisions of the other states would seem to be well conveyed by the above statement.

and stocks in a Tin Mining company, plus a bank balance are to be found in the Benue-Plateau State, certain immovable properties are situated in Ghana, and the deceased had an interest in a family property in the Mid-Western State where he died domiciled.

As regards the devolution of the properties, the parties to the succession suit, or the court on its own motion, may consider it inappropriate to apply jointly, the different substantive laws of the several legal systems with which the deceased, or his assets, had contact at the time of his death to determine who should succeed to the properties. Indeed, the deceased might have disposed all the disposable part of the assets, both movable and immovable, by one single will. To determine in such a situation the matter of succession to the estate by reference to the six odd legal systems of the territories where the properties are situated is seemingly the simplest but the most primitive solution of all. Under such an arrangement, the will would be valid in one State but may be invalid in the foreign country. A. would be able to take as a beneficiary in one state but may be unable to do so in another. This would lead to a result quite contrary to the intention of the deceased to make a valid legacy of his properties regardless of wherever they may be located at the time of his death. And the testator's intention is a matter of major consideration in deciding who should succeed to his estate in most cases. Even when the problem is uncomplicated by the fact that the deceased held the assets under two kinds

of law, the customary and the general laws, the court will still be faced with the primary question as to which particular municipal law should govern succession to the deceased person's estate, and as to whether the applicable law should be the same for the deceased movables and immovables, as under the systems of customary law.

To recapitulate, the determination of the simple question, which law governs the succession to the estate of a deceased person in Nigeria may involve a three tier reference.[18] First we must determine the particular municipal or territorial system of law which governs the issue. For this choice of law determinant, we must, obviously, employ the rules of private international law, e.g. the domicile of the decedent or the situs of the property. Having located the particular territorial law applicable with the aid of the connecting factors provided by private international law, we find that there is dichotomy of legal systems in existence in such territory. The next question, therefore, is to decide whether the governing law is the general law or the customary law of such territory. For this purpose, we employ the rules of internal conflict of laws, e.g. What type of marriage was contracted by the deceased? Is he the issue of a particular type of marriage? What is the nature of the property to be inherited and is it held under the system of customary law or that of the general

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18. As occurred in Yinusa v. Adesubokan, Unreported decision of the North Central State High Court, No. Z23/67 of 20/10/68.

law? If the deceased made a will, what is his intention as regards the applicable law as revealed by such will? Is the deceased a Moslem governed by Moslem law? If by employing one of such relevant tests, we discover that customary law, as opposed to the general law, applies, then we must go further to ascertain whether there are more than one system of customary law within the territorial unit. If so, we then proceed to the third and the final stage of reference by making a choice between the customary laws of the two or more ethnic groups within the state or territory, by applying the statutory provisions or rules of customary law relating to such interlocal conflicts, i.e. the lex originis or the lex rei sitae.

From this lengthy, but necessary, survey, it would have been apparent that problems of private international law relating to succession in Nigeria, cannot be divorced from problems of internal and interlocal conflicts relating to such matters. Both bodies of law are branches of the same tree. They may have different choice of law rules because of the different spheres in which they operate: Nonetheless, their rules should be complementary since they lead to the same goal, viz. the determination of the question, which law governs a particular legal relation. But it must be admitted that this sort of situation gives rise to often bewildering difficulties of characterization as to which problem is of private international law and which is of internal or interlocal conflicts. Hence the result of wrong analysis of legal problems has led, as in the field of administration

of estates, to the judges applying private international law remedies for problems of internal or interlocal conflicts and vice versa. Of course, the results have not been satisfactory.

For the problems of internal and interlocal conflicts, the ideal solution has been proposed[19] and accepted in principle by the respective Governments in Nigeria.[20] This is by the method of unification, by each state of the federation, of the different bodies of customary law now existing within its geographical boundaries, followed by an integration or harmonisation of the principles of such unified customary law with those of the state's general law, to produce a single territorial law applicable to all and sundry. But it must be stressed that to achieve this ultimate objective, especially the latter, will not be easy and will certainly take some time.[21] Therefore, with the painful awareness that dichotomy of laws will, at least for a while, continue with us even at the purely domestic level, it is proposed to grapple in this part

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19. See e.g. Allott, "Towards the Unification of Laws in Africa" in 14 I.C.L.Q. (1965) 366; and also, Harvey, The Law and Practice of Nigerian Wills, Probate and Succession (1968) p. 172.

20. See Report of the Dar-es-Salaam Conference on Local Courts and Customary Law in Africa (1963) pp. 56-81.

21. The Lagos and the Western States seem to be in the process of overcoming the hurdle of multiplicity of bodies of customary law within the states, as a result of the homogeniety of the ethnic group in each state. A conscious effort aimed at unification of bodies of customary law has so far been taken only by the Western state with the promulgation of such measures as the Marriage, Divorce and Custody of Children Adoptive Bye - Laws Order, W.R.L.N. 456 of 1958. This Order has been adopted by over 30 District Councils in the state.

with the problems of private international law relating to succession, indicating at the appropriate places, where the topic has been complicated by dualism of system of laws, and how the Nigerian private international law can deal with such peculiar complexities.

2. GENERAL PRINCIPLES OF PRIVATE INTERNATIONAL LAW.

There has never been any doubt in systems of private international law about the law that may possibly govern succession to the property of a deceased person. The competition has traditionally been between the law of the place where the property was situated at the time of death, i.e. the lex loci rei sitae or, to put it shortly, the lex situs; and the personal law of the deceased. As we have frequently stated, the personal law may be determined, on a first reference, by the law of the country of which the deceased was a national at the time of his death (lex patriae), or the law of the country in which he was domiciled at the date of his death (lex domicilii). On a second reference, it has also been seen that the personal law may ultimately be the law of the ethnic community of which the deceased was a member or the law applicable to adherents of the religion which he professed at the time of his death.

The real problem for each system of law is whether to apply both the lex situs and the personal law, or either, and if so, which of them, in determining the rights of succession to the estate of the deceased person in a conflictual situation. Hence the following diversity of solutions emerge according to whether the Lex Situs

Approach, the Unitary Principle of Succession or the Scission Principle (otherwise known as the Split System of Succession), is accepted.

(a) The Lex Situs Approach.

This is the oldest theory of all. It presupposes that there is no distinction in nomenclature between the assets making up the deceased estate, whether it be land or an item of property like a piece of furniture. Every portion of the property, whether movable or immovable, devolve according to the law of its location at the time of death of the decedent. The practical result of this approach is that whenever there is multi-location of properties, the law governing succession becomes various. In case of testate succession, a will that is valid by the law of one situs may be invalid by the law of the other. If A is entitled to take as a devisee for the purpose of the land situated in country O, he may inherit nothing out of the money located in country P. The fact that the testator designated him as the successor to both properties in his Will, is immaterial. If the deceased left no will, his next of kin according to the law of situs of property X. may be different from his next of kin as designated by the law of the situs of property Y. In short, whenever the deceased left properties e.g. in twelve countries or territories, at the time of his death, his estate is immediately dismembered into twelve separate units according to their location. Succession to each unit will be governed by the law of its location.

In view of the fact that the use of connecting factors based on location leads to a plurality of solutions for different parts of the estate, we have categorised this approach as the most primitive of all. Other writers have employed epithets of varying intensity in its attack, one of which is that the Lex Situs Approach constitutes a "monument of isolationism". Yet this principle is still found in the Montevideo Conventions of 1928 and 1940, to which some Latin American Countries are signatories. According to article 44 and 45 of the latter Convention:

> The law of the place where hereditary property is located at the time of death of the person whose estate is involved, governs the form of the testament.....
>
> "The same law of location governs:
>
> (a) The capacity of the heir or legatee to inherit;
> (b) The validity and effects of the testament;
> (c) The hereditary titles and rights;
> (d) The existence and amount of the available assets;
> (f) In fine, everything relative to the legitime or testamentary estate."

Because of its inconvenience, this approach will not be discussed further.

(b) The Principle of Unitary Succession.

By far the most successful of the choice of law rules for regulating matters of succession is the principle of unitary or universal succession. Wolff[22] points out that this solution "obtains today in a great majority of modern laws". Rabel[23] lists over thirty

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22. op. cit., p. 568.

23. op. cit., Vol. IV, pp. 257-259.

of such systems, including some common law jurisdictions like the Federation of Malaya and two African legal systems viz. Egypt and Congo Kinshasa (the former Belgian Congo); while Drobnig[24] emphasises the growing universalism of this approach with reference to certain treaties concluded between the East-European countries. To this growing list may be added the Ghanaian legal system.[25] And divergence between practice and principle is observed in the Sudan where the principle of unitary succession is operated in practice by the courts,[26] even though the Sudanese conflict methodology persists in calling the practice the Scission Principle.[27]

The rationale of this approach is akin to that which underlies the principle of unified administration. That is to say, that just as the deceased, during his lifetime, owned and managed his properties, whatever their nature and wherever they may be located, as one single entity, so also should these properties devolve on his death as a unit and according to one single system of law. For this solution, it is argued that if a person died testate and gave his properties to certain named persons, or if he died intestate, hoping that his properties would,

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24. "Conflict of Laws in Recent East-European Treaties" in 5 Am.J.Comp. L. 487 at p. 493.

25. See Wilson v. Wilson (1925) Div. Court (1921-1925) Rep.155

26. See Kattan v. Kattan (1957) S.L.J.R.35; Mihran Bidjikian and Others v. Estate of Hagop Stephanian (1967) S.L.J.R. 70.

27. For the meaning of this term, see below

in any event, descend to his next of kin according to law, the only municipal system that would be in his contemplation in both cases, would be the law of the territory with which he had the most real and substantial connection; in other words, his personal law. Why, it is asked, should the law of the place where the property is situated not recognise the legitimate claim of the deceased personal law in such situation? If the law of location had no objection, as a matter of policy, to the deceased owning the property during his life-time, why should it object to a beneficiary nominated by the deceased or designated by his personal law? If the conflicts rule of the country of location is prepared to co-operate with the personal law of the deceased in regulating devolution of his movable property, for example, why should it object to the same system of law governing succession to his immovable property situated in the same country?

These considerations move the majority of the world's legal system to cling to this Roman law concept of universality of succession, i.e. the principle that the same law had to determine succession to both the movable and immovable property of the deceased. In such countries like Colombia, Denmark, Norway and Quebec, where domicile is the connecting factor for determining the personal law, the law of the country in which the deceased had his domicile at the time of his death, governs succession to his properties. In others like Egypt, Germany, Greece, Italy where the principle of nationality is accepted as basis of personal law, the lex patriae at the time of death governs.

(c) The Scission Principle or the Split System of Succession.

This principle owes its origin to the "statute theory" of the sixteenth and seventeenth centuries by which Italian jurists, followed by their French successors, classified statutes and rules of law as either "Personal" or "Real". The Personal Statutes regulated men in their personal and domestic relations, as distinct from their proprietary and commercial affairs. They also applied whenever the person might be; whereas the Real Statutes were primarily concerned with things and applied within the territorial limits of the legal system in which the thing was located.[28] The application of this theory to matters of succession was attributed to D'Argentre.[29] He limited the categories in which personal statutes were applicable, but contended that statutes relating to movables should be classified as "personal", even though other statutes might remain "real".[30] When this theory was applied to succession, it meant the demise of the principle of unitary or universal succession. The resultant effect was the rise of the Scission theory of succession whereby the estate of a deceased person was split into the categories of movables and immovables. Succession to the decedent's movable property is governed by his personal

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28. Graveson, op. cit., 6th ed. p.32

29. Stumberg, Cases on the Conflict of Laws (2nd ed. 1956) p.3.

30. Thereby emphasising the preponderance of the real statutes and virtually eliminating the third category of "mixed statutes". See Stumberg, op. cit., p. 3 and Cheshire, op. cit., 7th ed. p.23.

law at the time of his death (on the basis that movables follow the person - mobilia sequuntur personam), while the lex loci rei sitae governs the descent of his immovable property.

The Scission Principle fitted perfectly into the legal orders of many European countries in which feudalism was the system of land tenure. As Aptly put by Wolff[30a] "the feudal lords could not allow the descent of their land to be affected if one of their vassals should acquire a foreign domicile". As could be expecfed, the principle of scission obtains today in most common law countries having the matrix of their legal systems in England, including majority of the United States of America. It is in vogue in Belgium, Chile, Costa Rica, France (therefore suggesting that it exists in most French law countries in Africa), San Salvador and Siam. For purposes of inheritance, these countries apply the lex domicilii as the personal law, while a second group e.g. Austria, Bolivia, Iran, Liechtenstein and Turkey, which also favours the split system of succession, apply the lex patriae as the personal law, to govern succession to the deceased movables.

Whether a given property is to be classified as movable or immovable is determined by the lex situs, according to most conflict rules. So the first difficulty about the scission principle is that two municipal systems of law may classify a particular type of property differently. For example, Wolff rightly points out that mortgages on immovable property are regarded under the French and German laws as movables, whereas English common law regards them

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30a. Op. cit., p.567

as immovables.[31] Thus if a person died leaving such properties both in France and England, different laws may have to be applied despite the fact that both systems are operating the same scission principle and moreover, using the same connecting factor of domicile to determine which law governs succession to his movable property. This divergence of classification is due to the fact that the meaning of the terms "movable" and "immovable" does not strictly conform with the popular meaning of "mobility" or "immovability" of the property being classified.[32]

3. SUCCESSION AND THE CHOICE OF LAW IN NIGERIA.

We have repeatedly stated that the Nigerian private international law owes its existence to the common law of England as at 1st January, 1900. The scission principle of succession has been established in England well over two centuries ago.[33] Therefore, it is beyond dispute that it is the scission principle or the split system of succession that is accepted as a general rule in Nigeria for the solution, inter-state and internationally, of the problem of multi-location of the properties of the deceased. In short, the private international law rules being applied in the Nigerian courts are that succession to the movable property of a deceased person is governed by lex domicilii at the time of his death;[34]

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31. Wolff, op. cit., p. 503.

32. ibid. p. 504.

33. See Pipon v. Pipon (1744) Amb. 25, 799; Bruce v. Bruce (1790) 6 Bro. P.C.566; Copin v. Copin (1725) 2 P. Wms, 291; Nelson v. Bridport (1846) 8 Beav. 547.

34. Re Whyte (1946) 18 N.L.R. 70; See also, Cole v. Cole (1898) 1 N.L.R. 15 at pp. 18 and 22.

while the lex situs governs the devolution of his immovable property.[35] It makes no difference to these rules whether the deceased died testate or intestate: the only exception being that if he died testate, his will will be tested also according to the scission principle. That is to say, that the formal as well as the essential validity of a will relating to immovable is governed by the lex situs;[36] whereas the formal and the essential validity of a will relating to movables are determined according to the deceased law of domicile at the time of death.[37]

A detailed analysis of these rules needs not be embarked on in a work of this nature since the rules of testate and intestate succession in conflictual situations can be found in standard English texts on this subject. The main purpose of this part is to consider what difficulties are being encountered in Nigeria in operating the rules. From this, it becomes clear that the adequacy or otherwise of the scission principle will be called into question with a view to discovering whether it needs be preserved in its present form in a country where dualism of systems of law leads, inevitably, to multiplicity of

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35. Re Ogunro's Estate (1960) 5 F.S.C.137; Yinusa v. Adesubokan, Unreported, North-Central State High Court decision No. Z23/67 of 30/10/68. This lex situs rule is so rigorously enforced that a Lagos High Court will not assume jurisdiction to entertain a claim for damages for trespass to land situated in the Western State. See The British Bata Shoe Co. Ltd. v. Melikian (1956)1.F.S.C. 100; Lanleyin v. Rufai (1959) 4 F.S.C. 184.

36. George v. George [1964] All N.L.R. 136

37. Yinusa v. Adesubokan, Unreported, North-Central State High Court decision No. Z23/67 of 30/10/68.

38. Dicey and Morris, op. cit., 8th ed. pp. 519-543 and 589-628; Cheshire, op. cit. 7th ed. pp. 481-523; Graveson, op. cit., pp. 504-536 and 548-560; Wolff, op. cit., p.567 et. seq.

laws. A discussion in this respect will cover the formal validity of wills. But first, we shall consider the slight, but necessary modification made to the choice of law rule concerning succession to the movable property of a deceased person under Nigerian private international law.

(a) Limitation of the Application of the lex domicilii by the Doctrine of Public Policy.

Re Whyte[39] seems to be the first case in which the common law rule of devolution of movable property according to the lex domicilii of the deceased at the time of his death was confirmed for Nigeria, besides the case of Cole v. Cole [40] where the applicable law was assumed to be the lex domicilii without any discussion. According to Brooke ag. C.J. in Re Whyte,

> "succession to the movable of the deceased is in general governed by the law of his domicile at the time of his death". [41]

It will be observed that the Chief Justice stated the principle in a general term, implying that exceptions may be made to it in certain cases. The only qualification to the general rule was made by the Chief Justice himself in the case.

The deceased was a member of Fanti tribe in Ghana. He died domiciled in Ghana leaving certain movable properties in Nigeria. There was no dispute about the law of the country which governed succession

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39. (1946) 18 N.L.R. 70.

40. (1898) 1 N.L.R. 15.

41. (1946) 18 N.L.R. 70.

to the movable properties of the deceased in Nigeria. This, the court confirmed to be the Ghanaian law since the deceased was domiciled there at the time of his death. The Ghanaian lex domicilii, however, provided that the deceased personal law was the law of his tribe, i.e. the Fanti customary law. The real dispute was whether the Nigerian court could vary the scale of distribution in a way not in accordance with Fanti customary law, as had been proposed by the ancillary representative of the deceased who was appointed in Nigeria viz. the Administrator General.

According to Fanti customary law the deceased sister succeeded to the whole of the estate, while the infant daughter of the deceased was to be taken to the family members in Ghana. Nothing was to be given to the widow of the deceased. The widow intended to continue living in Nigeria with her infant daughter. The deceased person's sister who inherited everything was a native of Ghana where she had always been resident. On the other hand, the Administrator-General made an application for an order authorising one third share of the estate to be shared equally between the widow and her daughter, the widow acting as the legal guardian of her minor child in utilising the daughter's share for her "maintenance, education and advancement". The remaining two thirds share was to be remitted to the deceased universal successor in Ghana.

Brooke Ag. C.J. held that though the Ghanaian lex domicilii of the deceased governed succession to

his movable property, such law must not be enforced in the particular case since the effect would be to separate mother and child from each other and compel the latter to live in a foreign country in which the mother was not minded to live. The court noted, but was unimpressed by, the fact that the deceased sister was obliged to maintain and educate the infant daughter. The judge therefore approved of the scheme of distribution proposed by the Administrator-General as being more equitable in the "special circumstances" of the case.

The case has been criticised by some writers [42] on Nigerian domestic law as being wrongly decided, mainly on the ground of its alleged failure to follow prior authority established by the Privy Council in Eshugbayi Eleko v. Government of Nigeria.[43] In that case it was held that a Nigerian court "cannot itself transform a barbarous custom into a milder one. If it still stands in its barbarous character it must be rejected as repugnant to natural justice equity and good conscience". It is therefore argued that since the Chief Justice did not find the rule of inheritance of the Fanti customary law repugnant as a whole, he ought not to have declared its application objectionable in the particular circumstances of the case. According to these writers, the Fanti customary law of succession ought to have been applied in its entirety.

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42. Park, op. cit., pp. 74-75; Daniel, The Common Law in West Africa, pp. 265-266; See also Keay and Richardson, op. cit., 237 to 238.

43. 1931 A.C. 662.

It is submitted that the learned authors of these views are completely mistaken as to the scope of the principle established in Eshugbayi's case. Moreover, their views seem to be out of tune with the conflict methodology of the common law. Eshugbayi's case was a case on administrative law in which the validity of an action performed by the Officer Administering the Government of Nigeria was the sole matter in issue. According to the Deposed Chiefs Removal Ordinance 1917,[44] the Governor of Nigeria may remove a Chief from one part of the country to the other on any of the following grounds:

> i. that the customary law of the area over which the Chief exercised his authority required him to leave the area, or
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> ii. that, in the opinion of the Governor, the Chief's removal is desirable so as to re-establish or maintain peace, order and good government in the area.[45]

Chief Eleko of Lagos had purportedly been deposed by a representative majority of the members of the ruling family in Lagos. As a result, the Officer Administering the Government ordered him to be taken to another part of the country. The order was based on the ground that the customary law of Lagos demanded such a measure. The Chief, in a habeas corpus application, challenged the order on the grounds, inter alia, that (a) the fact of deposition and justifiability of such action according to the relevant customary law, and (b) the existence of a rule of customary law authorising his expulsion from his area of authority,

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44. No. 59 of 1917, as amended in 1925.

45. ibid. S. 2 (1).

were conditions precedent to his deportation by the Governor under the Ordinance. It was contended that these factors were not present and that the deportation order made by the Officer Administering the Government was, therefore invalid.

In the court below, Tew J., held that any dispute concerning the desposition of the Chief was not cognizable by the courts in so far as the Officer Administering the Government had been satisfied that the Chief was deposed. On the second ground, he held that there was a rule of customary law which compelled the deportation or banishment of a deposed chief. He therefore held that the deportation order made by the Officer was valid. On appeal, the court was divided as to whether the fact and validity of the deposition by the ruling family were matters cognizable by the courts. The matter went on to the Judicial Committee of the Privy Council whose views were first, that both grounds on which the appeal was based were matters into which the courts could inquire, and secondly, that the failure of the trial judge to adjudicate on the issue as to whether the Chief was properly deposed vitiated his finding that the Lagos customary law provided for the banishment of a deposed chief. The Judicial Committee, therefore, ordered the questions, whether customary law required the chief to be deposed, and if so, whether he was in fact deposed in a manner authorised by that law, and such similar matters, to be referred to the lower court to be decided anew.

In this connection, the Committee noted with interest the opinion of the trial judge that the original

custom was that a chief who had fallen out of favour with his subjects should be killed, but that a milder custom of banishment had been substituted. On this point, the Judicial Committee further gave a direction that it would be wrong to accept evidence of such modifications of the customary law without ascertaining whether the custom which modified it had been accepted by the local community as a whole. The particular portion of the judgment of Lord Atkin on this point was as follows:

> "It would..... be necessary to show that in their milder form they are still recognised in the native community as custom, so as in that form to regulate the relations of the native community inter se. In other words, the Court cannot itself transform a barbarous custom into a milder one. If it stands in its barbarous character it must be rejected as repugnant to 'natural justice, equity and good conscience'. It is the assent of the native community that gives a custom its validity, and, therefore, barbarous or mild, it must be shown to be recognised by the native community whose conduct it is supposed to regulate."

From the above analysis of the case, it would have been seen that the decision was on the domestic law of Nigeria, just as the statute which provides that customary law should not be enforced if it is "repugnant to natural justice, equity and good sconscience" is only of territorial operation. Like the statute, the rule established in the case deals with the method of ascertainment of customary law at the domestic level and the inability of a Nigerian judge to substitute, in the guise of judicial development of legal rules, his own notion of justice for an alleged barbarous rule of customary law. The danger of such judicial legislation was pointed out by the Judicial Committee as the non-acceptance of such modified rule by the native community and the disrepute into which the law would be brought as a result. Eshugbayi's case has never

purported to fetter the Nigerian courts' inherent power under the common law to declare a foreign law otherwise applicable to a legal relation inapplicable on the ground of public policy.

According to Cotton L.J. in the English Court of Appeal's case of Sottomayor v. De Barros,[46]

> "No country is bound to recognise the laws of a foreign state when they work injustice to its own subjects".

The Lord Justice also emphasised, in the same passage, that this principle of public policy applies in specific instances to prevent an undesirable solution; therefore, the judgment in a case in which the doctrine has been applied does not necessarily constitute an authority for subsequent cases. Since the question in Re Whyte[47] was one of application in Nigeria of the Ghanaian law, and since it is not disputed even by the critics of the case, that had the Fanti customary law been strictly applied in the particular case, its effect would have been the separation of an infant child from her only surviving parent, public policy considerations demand that such foreign law should not have absolute sway in Nigeria.

It must, however, be admitted that the Acting Chief Justice did not expressly attribute his rejection of the Fanti customary law of succession to public policy, but based his decision on the authority of the "repugnancy clause" i.e. the statutory rule that the court should strike out any customary law rule which is repugnant to

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46. (Nol.) (1877) 3 P.D. 1 at p.7.

47. (1946) 18 N.L.R. 70.

natural justice, equity and good conscience. It is submitted that in doing so the Acting Chief Justice was in error. No doubt the line of distinction between the repugnancy clause and the doctrine of public policy is thin indeed. Nonetheless, they are not identical in scope. As we have pointed out above, the repugnancy test is of territorial operation and applies only to customary law. Thus, no court in Nigeria can reject the application of a common law rule in a concrete case under this clause. On the other hand, the doctrine of public policy is of global relevance. Under it, the application of any rule of a domestic law and that of a foreign system of law can be rejected in the particular case as contrary to the interest of the state or that of the community at large.[48] Furthermore, the rule of the foreign law whose application is being denied on ground of public policy needs not be customary or tribal in origin; it may be a rule of the general law of the foreign country.

Besides the above objection, there is no denying the point that the judgment of Brooke Ag. C.J. could be categorised as a public policy decision on the sole reason given for the decision. And to do this, we do not have to look for a passage in the judgement in which the Acting Chief Justice expressly declared that he was applying the doctrine of public policy. To quote the words of Cozens-Hardy M.R. in Re Hall,[49] "you do not look for public policy, in the sense in which that expression is

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48. See Graveson, op. cit, 6th ed. p. 169; Cheshire, op. cit., 7th ed. p. 135.

49. [1914] P. 1 at p.5.

used, in an Act of Parliament. It is something which is really part of the common law of the land and does not depend upon statute".[50] And common law, as the legal historians will put it, is embedded in the breast of the judges.

Thus explained, the decision of Brooke Ag. C.J. should betaken as merely an affirmation in Nigeria of the general head of public policy under which a rule a foreign lex causae may be disregarded in particular case where its enforcement will work injustice to subjects of the local jurisdiction. This, like all heads of public policy, is not confined to the field of succession, but extends to any action in which a foreign law is applicable.[51] Re Whyte [52] therefore constitutes a particular instance of the application of such doctrine. The limitation placed on the doctrine by Cotton L.J. in Sottomayor v. De Barros[53] effectively prevents a state court in Nigeria using the doctrine to strike down the law of succession of a matrilinial society in Ghana or in an Eastern Nigerian state, for example, if the law of such territory happens to be the lex causae,[54] unless the same sort of injustice produced in Re Whyte will be reproduced in the latter case.

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50. This statement must be qualified in Nigeria in relation to the application of public policy to rules of customary law by virtue of s. 14 (3) of the Evidence Act, Cap. 62, Laws of the Federation of Nigeria, 1958 ed.

51. Indeed, in Sottomayor v. De Barros (No. 1) (1877), 3 P.D. 1, where the principle was established, the matter concerned the essential validity of a marriage: And, as pointed out by Kahn-Freund "Reflections on Public Policy in the English Conflict of Laws" in 39 Tr. Gr. Soc (1954) 39 at pp. 56-57, the rule formulated in Sottomayor v. De Barros (No. 1) and subsequently applied in Sottomayor v. De Barros (No. 2) (1879) 5 P.D.94. "ought not to appear in our textbooks in the section on marriage but in the introduction which deals with public policy."

52. (1946) 18 N.L.R. 70.

53. (No. 1) (1877), 3 P.D. 1.

(Cont. on next page)

Our conclusion, therefore, is that the decision of Brooke Ag. C.J. in this case rests on a sound foundation provided we bear in mind that public policy is the only satisfactory basis for the decision and that the doctrine in private international law is "an ultimum remedium preventing judgments with bad effects."[55]

A final point of difficulty about this case is that after the foreign lex domicilii of the deceased had been rejected in the special circumstances of the case, the only alternative law applicable under the doctrine of public policy should have been the lex fori. But there is no known Nigerian law which justified the scheme of distribution proposed by the Administrator-General and which was eventually approved by Brooke Ag. C.J.

(b) Dispensing with the Scission Principle in the Nigerian Private International Law.

i. Formal Validity of Wills

It has been seen that the common law rules relating to the formal validity of wills are based on the Split System of Succession or the Scission Principle. The will of immovable property is governed as to form by the law of the place where the property is located and

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54. (Cont. from previous page)

54. Failure to appreciate this point led Okoro, op. cit., p.233 to suggest that the effect of the decision in Re Whyte is that the law of matrilineal succession of certain communities in the Eastern states will not now be enforced on the basis that it is contrary to natural justice, equity, etc.

55. Baxter, Essays on Private Law, Foreigh Law and Foreign Judgments, p.12.

the form of a will of movable property is governed by the law of the domicile of the testator at the date of his death. In 1964, the Federal Supreme Court, in George v. George[56] approved the statement of the law made as above by the High Court of Northern Nigeria. This raises the question as to whether both the Northern Nigeria High Court and the Federal Supreme Court fully addressed their minds to the law on this topic, so as to discover whether or not the qualifications introduced by statutes in England to this common law principle are part of the law of any territorial unit within Nigeria, especially the Northern Nigerian states. Unfortunately, this is a topic on which it is impossible to speak of a uniform conflicts rules in all the Nigerian states as in other fields. Consequently, the answer to the question raised must be considered with reference to three groups of states viz. the Lagos and the six Northern Nigerian states; the Western and the Mid-Western states, and the three Eastern Nigerian states.

The Lagos and the Northern Nigerian States:

As pointed out earlier, section 16 of the High Court of Lagos Act and section 33 of the Northern Nigeria High Court Law provide, almost in identical terms that the jurisdiction of the High Court of a state in "probate causes and proceedings" may be exercised "in conformity with the law and practice for the time being in force in England". The interpretation placed on the predecessor of these provisions by the West African Court of Appeal in Taylor v. Taylor[57] is

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56. [1964] All N.L.R. 136.

57. (1935) 2 W.A.C.A. 348 at p.349.

that "in probate causes and proceedings the law and practice in Nigeria change as the law and practice in England change". Therefore, the current English law and practice applies in the Lagos state and in each of the six Northern Nigerian states. Any suggestion that the application, in these states, of English law and practice relating to probate jurisdiction is discretionary, because of the use of the word "may", instead of "shall" in the provisions, goes into the melting pot when it is recalled that none of the states has substantive or procedural laws on administration of estates or on the grant of probate.

The next question is, what is meant by "probate causes and proceedings" in the two enactments? Fortunately, these words have been the subject of two judicial pronouncements by the former West African Court of Appeal. In Godwin v. Crowther,[58] it was held that "probate causes and proceedings cannot mean more than causes and proceedings connected with the grant or recall of probate[59] or letters of administration". And in Taylor v. Taylor,[60] the same court, after expressing an unanimous view that "the grant of Letters of Administration is a probate matter", went on to propound a test for determining whether a particular matter relates to probate or to succession: "The test to be applied" the court said, "is 'would this matter in England be dealt with in

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58. (1934) 2 W.A.C.A. 109 at p. 111 and 112.

59. Emphasis supplied.

60. (1935) 2 W.A.C.A. 348 at p. 349

the Probate Division or in the Chancery Division'? If in the former it is a probate matter, if in the latter, it is not a probate matter".

In England, probate, in the sense of a certificate issued by the court to the effect that the will of a certain person has been proved and registered in the court, can be granted, either in solemn form (per testes), or in common form. The per testes form is used when there is a probability that the validity of the will will be disputed, and in such case, an action is commenced by the person who wishes the validity of the will to be established, against the person who disputes it. The common form procedure is employed when there is no likelihood of a dispute arising about the validity of the will. In either case, the Probate Division in England will not admit to probate a will which is not executed in accordance with the requirements of the English Wills Acts.[61] Hence the statement that probate of a will proves the nature of an instrument as a will. In other words, the formal validity of a will, whether or not pleaded as an issue, is a condition precedent to its registration by the court.

If the will was made by an English domiciliary, or if it was made in England, or is one which relates to immovable property situated in England, then the internal law of England may be consulted in testing its formal validity. If it is the will of a foreign domiciliary, or was made abroad, or is one which relates to a foreign

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61. Cock v. Cooke, (1886), L.R. 1 P. & D. 241; In the Goods of Coles (1871) L.R. 2 P. & D. 362; Warwick v. Warwick (1918), 34 T.L.R. 475 (C.A.); Godman v. Godman 1920 P. 261 (C.A.).
See also, Halsbury's Laws of England, 3rd ed. Vol. 16, pp. 172-173.

immovable, then recourse will have to be made to English private international law rules for the choice of the legal system which governs the formal validity of the will.

On the authority of Godwin v. Crowther,[62] a proceeding to determine the formal validity of a will is one connected with the grant of probate in so far as an invalid will will not be probated; and according to the test propounded by Kingdom C.J. in Taylor v. Taylor,[63] the formal validity of wills is a matter exclusively dealt with in the Probate Division of the High Court in England, and hence a probate matter. Since the laws and practice relating to probate and administration in the Lagos and the Northern Nigerian states change as the law and practice in England change, it becomes apparent that the law in England relating to the formal validity of wills, as modified by the Wills Act, 1963, applies in these states.

Section 1 of the Act provides, in effect, that a will, whether of movables or immovables, shall be treated as properly executed if its execution conformed to the internal law in force in the territory

(a) where the will was executed, or

(b) where, either at the time of execution or at the time of the testator's death,

(i) he was domiciled, or

(ii) he had his habitual residence, or

(iii) he was a national.

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62. (1934) 2 W.A.C.A. 109.

63. (1935) 2 W.A.C.A. 348.

Section 2 (1) (b) of the Act provides, as an additional rule, that a will of immovable property shall be treated as properly executed if its execution conformed to the internal law in force in the territory where the property was situated. The conclusion arrived at is that by a process of legislation by reference, and without any conscious effort by any of the states, all the options available to the English courts in testing the formal validity of wills in conflictual situations are now open to the Lagos state and the six Northern Nigerian states. Also by this chance element, the unjustifiable distinctions and unnecessary complications in the common law rules of private international law relating to the formal validity of wills have now been removed in this group of states.

The Western and the Mid-Western States.

It has been pointed out above that the effect of section 8 of the Western Nigeria High Court Law and Section 9 of the Mid-Western State High Court Law, is to empower the respective High Courts to exercise their jurisdiction in probate and administration in conformity with the jurisdiction,[64] as opposed to law and practice, being exercised by the High Court of Justice in England.[65] The same submission made above, that the determination of the formal validity of wills is a probate matter, applies to these two states as well as the third group of states whose choice of law rules on this topic will shortly be considered.

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64. Emphasis supplied.

65. See Chap. 8 p.609 and footnote 9.

But as regards the law to be applied by the courts of the Western and Mid-Western states, in determining the formal validity of wills presented to them for probate, section 4 of the Law of England (Application) law[66] becomes relevant. It provides that no "Imperial Act"[67] hitherto in force in any of the two states shall have any force or effect as from the commencement of the Law. In place of such English statutes, the two states have their own set of statutes, compiled in 1959. The statutes are mostly re-enactments and adaptations of the English statutes of general application as at 1st January, 1900. A significant ommission from such compilation is the English Wills Act, 1861 which introduced some qualifications to the scission principle as regards the formal validity of wills of British subjects who were domiciled abroad. However, section 3 of the Law of England (Application) law continues in the two states the operation of the English common law. The net result of the continued application of the English common law, and the omission of the English Wills Act in the operative enactments of the states, is that only the common law rules of private international law which refer the formal validity of a will of immovable to the lex situs and the formal validity of a will of movable property to the law of the last domicile of the deceased, are operative in the Western and the Mid-Western states.

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66. Cap. 60, Laws of Western Nigeria (1959 ed.) The Law also applies to the Mid-Western state. by virtue of the Mid-Western Region (Territorial Provisions) Act 1963, Federal Act No. 19 of 1963, S.2.

67. Defined in section 2 of the Law as any "statute enacted by the Parliament of England, the Parliament of Great Britain and Ireland, or the Parliament of the United Kingdom of Great Britain and Northern Ireland".

The Eastern Nigerian sStates.

The "law and practice for the time being in force in England on 30th September, 1960" are operative, as we have seen,[68] in the three Eastern Nigerian states as regards the grant of probate. It has also been shown above that the formal validity of wills are probate matters within the context of this provision. In this group of states, therefore, the common law principle of scission applies. Furthermore, it is clear from the proposition, that the formal validity of a will is a condition precedent to its probation, that the English Wills Act, 1861 applies in these states.[69] This is because the Act is not merely a statute of general application in England on 1st January, 1900,[70] but more important, because it was the law being applied in England on 30th September, 1960 for determining the formal validity of Wills presented for probate, as the language of its provisions quoted below will confirm.

The Wills Act, 1861 was passed as an endeavour to overcome the hardships caused by the common law rules to British subjects. Sections 1 and 2 of the Act provided as follows:

> "I. Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed <u>for the purpose of being admitted in England and Ireland to probate</u>,[71]

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68. Chap. 8 p. 609 n.8

69. The Wills Act, 1861 has now been repealed in England by the Act of 1963.

70. See, Eastern Nigeria, High Court Law, s.15.

71. Emphasis supplied.

and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin.

2. Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed and shall be admitted in England and Ireland to probate,[71] and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made."

Contrary to the view expressed by Harvey,[72] it will be quite easy to construe the above provisions "with such formal or verbal alterations not affecting the substance as to names, localities, courts, offices, persons... and otherwise as may be necessary to make it applicable to the circumstances" obtaining in Nigeria.[73] Thus, "British subject" as used in the provisions will become "Nigerian subject" or "Nigerian citizen". "United Kingdom" will be altered to "Federation of Nigeria" as already held in Arinze v. Arinze.[74] A reference to "England, Scotland or Ireland" will be construed as a reference to the three Eastern Nigerian states, viz. East Central state, South Eastern state, or the Rivers state, as the case may be. And the words "Her Majesty's dominions will

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72. op. cit., p.8.

73. Interpretation Act, s. 15 Cap. 89, Laws of the Federation of Nigeria (1958 ed.).

74. [1966] N.M.L.R. 155 at p.157.

become simply "the Commonwealth" according to current Constitutional law usage. With the incorporation of these formal alterations, the whole of section 1 of the Act will read thus:

> "Every will and other testamentary instrument made out of the Federation of Nigeria by a Nigerian citizen (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in East-Central state, South-Eastern state or the Rivers state to probate, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of the Commonwealth where he had his domicile of origin."

And as regards section 2 of the Act, the necessary verbal or formal alterations will be made on the above lines.

In short, the effect of the operation in the Eastern Nigerian states of the English Wills Act, 1861 is that any will made by a Nigerian citizen outside the Federation of Nigeria shall be considered as formally valid if it relates to personalty and its execution conforms to any of the following systems of law:

(a) the law of the place where the will was executed (lex loci actus);

(b) the law of the domicile of the testator at the time of making; (lex domicilii praesentis)

(c) the law of the domicile of origin of the testator (lex domicilii originis), provided such domicile is located in a territory within the Commonwealth.

If the will was made by a Nigerian citizen in one of the Nigerian states, then the will will be valid if it conforms

to the lex loci actus. That the last provision of the Act in this respect is an unnecessary repetition of the first, is clear enough.

This Act was much criticised when it was the law in England.[75] These adverse comments contributed greatly to its repeal; but in so far as the statute continues to form part of the conflicts rules of the Eastern Nigerian states, these criticisms must, briefly, be mentioned. The first is that it provides only for the formal validity of wills of testators who are citizens of Nigeria. If this limitation could have been justifiable in the early history of Nigeria, there is no logical basis for its retention at the present time when the economic potentialities of these oil-producing states draw a large number of foreign nationals into them.

Secondly, the Act deals with the wills of personal estate which constitutes a cross-section of movables and immovables. It is, therefore, merely a parliative which does not completely cover the will of movable property and applies only to few wills of momovables. As rightly pointed out in the Fourth Report of the English Private International Law Committee[76]

> "The Act is manifestly dealing with situations involving rules of private international law in which the universal distinction is between movable and immoveable property; yet it applies the purely domestic distinction between real and personal property. The incongruous result is that, while

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75. See e.g. Falconbridge, 32 Can. Bar. Rev. (1954) 426, at pp. 430-434; Fourth Report of the Private International Law Committee (England), Cmnd. 491.

76. Ibid. para. 4 (c) (ii).

> the provisions of the Act apply to all moveable property (except such as are treated as immovables by association with land, e.g. keys and title deeds), it has been held also to extend to such immovable property as freehold land held on trust for sale and leasehold".

The third defect of the Act is that it determines the formal validity of a will of personalty by reference to the law in force in that part of the Commonwealth where the deceased had his domicile of origin. According to the existing "revival doctrine of domicile of origin", coupled with the principle of 'dependent domicile",[77] the rule contained in section 1 of the Act may operate to fix the law which will govern the form of execution of the testator's will in a country which the testator did not know and in which he did not live, and consequently, whose law he was not acquainted with. The artificiality of making the lex domicilii originis the applicable law which will govern formal validity of a will is another reason adduced by the above-named Committee in favour of its rejection by most systems of private international law.

We may now sum up the absurd result of legislation by reference as it has affected the law on formal validity of wills in the Nigerian states. The English Wills Act 1963, operates in the Lagos and the six Northern Nigerian states. Consequently, a testator whose will is to be probated in any of the seven states, has the option of eight systems of law with which the execution of the will can be tested. With the wider choice

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77. See Chapter 2 for the meaning of these terms.

of laws, a testator's expectations as to who should succeed to his property will probably not be defeated by his lack of knowledge of the intricacies of private international law.

In the Western and the Mid-Western states, he must be properly schooled in the scission principle by which the formal validity of the will of his movable property is governed by the lex domicilii testatoris and by which the formal validity of the will of his immovable property is regulated by the lex situs. Otherwise his expectations will be frustrated.

In the three Eastern Nigerian states, the scission principle has been supplemented by the provisions of the English Wills Act, 1861. As a result, there is polarization between foreign nationals and citizens of Nigeria as regards the law governing formal validity of wills. The former must comply with the lex situs in in executing wills of immovable properties and with the lex domicilii in making wills relating to movable properties. The latter, however, have the choice of three additional systems of law in making wills of personalty, as distinct from realty. These are the lex loci actus, the lex domicilii praesentis, and the lex domicilii originis in a Commonwealth country.

The lamentable result of the diversity of rules of private international law for determining the formal validity of wills in the Federation may be illustrated by the following hypothetical case.

H. and W., who were husband and wife, were domiciled in the Western State at the dates of their death. They made a joint will in holographic form in the East Cameroon, where they lived for a considerable time. According to East Cameroon law, a holograph will requires no attestation. W. also made a holograph will in accordance with the East Cameroon law. H. was a Nigerian citizen while W. was a na tional of the Cameroons Republic. The joint will contained a devise of the spouses' leasehold properties situated in the Western, the Lagos, and the Eastern-Central states to D. By W.'s will, she bequeathed her valuable jewelleries located in the Lagos state and a certain bank balance situated in the Western state to L. Probate of the two wills was sought by X. Who was appointed executor under both wills, in the Western, the Lagos and the East Central states.

For convenience, we shall consider first, the formal validity of the joint will of leasehold properties according to the conflicts rules of their states of location. In the Western state where the scission principle is still fully adhered to, the leasehold estate would be classified as immovable.[78] There, a will of immovable property is governed by the lex situs at the time of the testator's death. Since an unattested will is invalid according to the Western State's Wills Law, 1959,[79] the law obtaining at the situs of the property, it follows that the holograph will is invalid, whatever the view of the East Cameroon's law might have been on it.

In the Lagos state where the English Wills Act, 1963 operates, the holograph will in relation to the leasehold property situated in the state is valid since it conformed to the law of East Cameroon where it

78. Freke v. Lord Carbery (1873) L.R. 16 Eq. 461
79, Cap. 133, Laws of Western Nigeria, (1959 ed.) s.6.

was executed. The fact that holographic wills are not permitted in the Lagos state would be considered immaterial. Therefore, D. succeeded to the Lagos property even though he could not inherit the Western state property.

The problem is more complicated in the East - Central state. There, as we have seen, the scission principle has been modified by the English Wills Act, 1861, in favour of Nigerian citizens. But the joint will by which the leasehold property, situated in the East-Central state, was devised, was made by persons one of whom was not a Nigerian citizen, i.e. a national of the Cameroons Republic. Had the will been made by H., the Nigerian national, alone, it would have been formally valid since it was a will of personalty which complied with the lex loci actus.[80] The question is, should the court hold the joint will wholly invalid since both testators were not citizens of Nigeria? Or should the joint will be held valid as to the moiety of the property? We find it difficult to hazard a guess as to what the decision of an East-Central state court would be under such circumstances. But whatever it is, the result would be inequitable.

We now come to W's will relating to her jewelleries and bank balance situated in the Lagos state and the Western state respectively. According to the Western state conflicts rule, the formal validity of a will of movable property is governed by the testator's lex domicilii at the time of death. In so far as Western state was the domicile of W. at the time of her

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80, s. 1 Wills Act, 1861.

death and since a holograph will is invalid by that state's wills Law, W's holograph will is invalid and consequently, L. could not inherit the money.

But as regards the same will disposing of W's jewelleries in the Lagos state, a Lagos state court would hold it formally valid by virtue of the English Wills Act, 1963 which operates in the state. As we have indicated above, one of the choice of law rules provided by the Act for determining the formal validity of wills is that of conformity to the law of the place where it was made. And the will presented for probate in the state had been executed in accordance with the law of the East Cameroon where the testatrix was living at the time of its execution. Therefore, L. takes the jewelleries.

In short, a single will disposing of leasehold properties situated in three states of Nigeria has different effect in each of the states. The devisee succeeds in one, he was unable to take in the second, and his position in the third is uncertain. Similarly, the will of the testatrix in respect of movables is considered valid in the Lagos state, but void in the Western state where she was domiciled.

We believe that the time is long overdue for a consideration of uniform proposals as regards the formal validity of wills in all states of the Federation, rather than leaving the matter to the chance element of what the result of legislation by reference to English law will be. In this respect, there could be no better solution than to accept the Convention on the Conflicts of Laws Relating to the Form of Testamentary Disposition made at the Hague

on October 5, 1961.[81] The conclusion of this Convention owes its origin to the suggestion of the United Kingdom delegation to the Hague Conference in 1956 and 1960. Hence the similarity between the proposals suggested in 1958 for adoption in the United Kingdom by the Lord Chancellor's Private International Law Committee[82] and the rules finally adopted by the Hague Conference on Private International Law.[83] As at 15th March, 1969, the Convention had been ratified by not less than 6 countries, viz. Germany, Austria, France, Japan, Yugoslavia and Great Britain.[84] The effect of ratification is that the Convention becomes law in all the countries which had ratified it. For instance, it was with a view to the subsequent ratification by the United Kingdom on 6th November, 1963 that the Wills Act, 1963 was passed on 31st July of the same year.[85]

The success of this British initiative can be seen in the number of countries which, either had acceded to the Convention itself, or adopted a statute based on it. For example, Ireland and Botswana were not parties to the promulgation of the Convention but later adhered to it in August, 1967 and January 1969 respectively.[84] Gambia chose, instead of adhesion, to adopt the English statute of 1963

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81. For the text of this Convention see, Cmnd 1729 of 1962.

82. Cmnd. 491 of 1958.

83. The rules contained in the Hague Convention are more extensive than the ones suggested by the Fourth Report of the Lord Chancellor's Private International Law Committee in that the former made the law of the territory where the testator habitually resides, either at the time of execution of the will or at the time of the testator's death, applicable laws.

84. See, Revue Critique de droit international prive, Vol. 58, (No. 1) 1969, p.169.

85. The Act, however came into effect in England on January 1, 1964.

as part of its own rules of private international law on the subject. Thus, according to Gambia's Law of England (Application) Law, 1966, it is provided that

> "The Wills Act, 1963, shall apply to the Gambia and shall be deemed to have had effect therein from the 1st day of January 1964. [86]

Similar rules are being recommended for adoption in Kenya by the Country's Commission on the Law of Succession. Section 16 of the Commission's Draft Bill on Law of Succession contains a slightly modified version of the English rules.[87] It is reliably learnt that this Bill will soon become law.

Since the rules of the Hague Convention relating to the formal validity of wills is the child of the United Kingdom, nurtured into existence with the assistance of such a country like France, it is almost certain that many more legal systems in the common law and the French law countries of Africa will soon adopt these rules in one form or the other.[88] The Nigerian states should bring their laws on formal validity of wills into line with the convention and hence join in the unification of systems of private international law on this subject. Furthermore, such measure will arrest the chaos obtaining at the inter-state sphere as a result

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86. s. 20, Cap. 104, Laws of The Gambia (1966 ed.)

87. See Report of the Kenya Commission on the Law of Succession, (Nairobi: Govt. Printer, 1968). Para.91-93.

88. Indeed, such country like Egypt has long shown a certain degree of liberalism as regards the choice of law rules for determining the formal validity of wills. Art. 17 of the Egyptian Civil Code 1949, provides that "The form of a will is governed by the national law of the testator at the time the will is made, or by the law of the country in which the will is made".

of lack of any national policy on this topic.

ii. For Other Matters of Succession.

It has been pointed out in the early part of this chapter that there is dualism of laws within each state of Nigeria, that questions of interlocal conflicts under the system of customary law often cut across the territorial frontiers of the sister-states, and that the choice of law rule provided by statutes, or enunciated by judges, for resolving problems of interlocal conflicts is based on the unity of succession in so far as the rule is that of succession according to the personal law of the deceased, whatever the nature of his property and regardless of the multi-locations of such assets at the time of his death. This is in sharp contrast to the position under the general (territorial) law under which the scission principle prescribed by the common law for inter-state and international conflicts results in the estate of the deceased being split into two categories of movables and immovables; succession to the first part being governed by the personal law of the deceased, i.e. his lex domicilii, at the time of his death, while devolution on death of the other part is regulated exclusively by the lex situs.

Obviously, the co-existence of these two principles which are diametrically opposed to each other cannot work harmoniously in regulating succession to the estate of deceased persons, not to mention the complications that would be introduced when, as the Federal Supreme Court

case of Lawal v. Younan[89] and section 49 (5) (b) of the Western Nigeria, Administration of Estates Law[90] have shown, both the general law and the customary law cumu-late to determine rights of succession to different portions of the deceased estate. The difficulty, of an attempt to blend these two principles together can be seen in the first of the following two cases, while the second reveals, in a glaring manner, the irrelevance of the scission principle in interstate conflicts.

In Owe v. Owe,[91] the intestate was survived by twelve children of his four polygamous marriages. A thirteenth child, who was a daughter, predeceased him and her share was claimed by her three children. The estate comprised of three houses and three pieces of land. Two houses were in what was then the Federal Territory of Lagos (now the Lagos state), while the rest of the properties were located in the former Western Region of Nigeria.[92] It appeared that the deceased and all the beneficiaries were domiciled in Lagos, a territory

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89. [1961] All N.L.R. 245

90. Cap. 1, Laws of Western Nigeria (1959 ed.)

91. (1966) Unreported decision of the High Court of Lagos, Suit No. Ld/13/66 of 5/9/66.

92. An interesting point about the case is that if the proceedings had been commenced after 26th May, 1967 (the twelve states structure came into operation on 27th May, 1967) all the immovable properties would have been situated in the same jurisdiction i.e. the Lagos State, since all that part of Western Nigeria where a house and three pieces of land were situated has now been merged with the former Federal Territory of Lagos and called the Lagos State.

of which they were natives. The dispute merely concerned the mechanics of distribution, i.e. the respective shares of the fifteen beneficiaries. There was no dispute as to the applicable law which the parties assumed was the Lagos customary law. Indeed, the per capita (Ori o j'ori) system of distribution, which was sanctioned as a fair system of distribution by the Privy Council in Dawodu v. Danmole,[93] had been decided upon. And this was the system employed by the judge to declare the respective shares of the beneficiaries.

It will be remembered that for inter-local conflicts, the applicable law for determing who succeeds to the estate of a deceased person is his personal law. This customary choice of law rule, which the Lagos High is enjoined to apply,[94] makes it unnecessary for emphasis to be placed on the jurisdictional factor, i.e. which court of a state has jurisdiction to determine rights of succession to immovable property situated outside the state but within Nigeria. But being a common law judge, Omololu J., proceeded by adopting the jurisdictional rules of the common law as regards foreign immovables and found, on prior authority,[95] that the Lagos High Court had "no jurisdiction in making an order of distribution regarding the immovable property in Western Nigeria". This statement notwithstanding, he went on to deliver the following judgment:

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93. [1962] All N.L.R. 702; [1962] 1 W.L.R. 1053.

94. High Court of Lagos Act, Cap. 80, Laws of the Federation of Nigeria (1958 ed.) s. 27.

95. e.g. British Bata Shoe Co. v. Melikian (1965) 1 F.S.C. 100; Lanleyin v. Rufai (1959) 4 F.S.C. 184. These cases were, however, not cited to the judge.

> "The order of the court shall be as follows:..... With regard to the properties situated outside the jurisdiction of this court, that is, 194 Ikorodu Road, the two Farmlands...and the Building plot at Ijoko [Western Nigeria], it is hereby declared that the plaintiff and the defendants [all the beneficiaries] are entitled to them in equal proportions, that is 1/13th portion each".

In arriving at this conclusion, the learned judge applied the common law exception to the lex situs rule which was approved by the Federal Supreme Court in Re Ogunro's Estate.[96] This is to the effect that where the court has jurisdiction to administer an estate and the property includes immovables situated abroad, the court has jurisdiction to determine questions of title to the foreign immovables for the purpose of administration.[97] This exception the judge was justified in applying since the plaintiff's action included a claim that an account should be rendered by some of the other beneficiaries who were the personal representatives of the deceased.

But it must be emphasised that the exception relates only to jurisdiction. It does not, as the Federal Supreme Court clearly recognised, authorise the local court to employ the lex fori, as opposed to the lex situs, in determining who is entitled to succeed to the foreign immovable or in what proportions the beneficiaries should take.[98] However, there is no indication in the whole of the judgment that the learned judge ever bothered to ascertain what the law of succession in the Western

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96. (1960) 5 F.S.C. 137.

97. ibid at p. 139.

98. Nelson v. Bridport (1846) 8 Beav. 547; See also Dicey and Morris, op. cit., 8th ed. p. 526.

Nigerian situs of the properties was, so as to discover whether it was the same as the Lagos customary law on the system of per capita distribution. The impression conveyed is that once the judge had overcome the problem of jurisdiction, he saw no necessity for applying any other law than the Lagos customary law. But it is uncertain whether the law applied as the personal law of the deceased or as the lex fori.

The ascertainment of the principle applied did not present such difficulties in Yinusa v. Adesubokan.[99] Only the result of the application of the scission principle was deplorable. The testator was a Moslem and was also a member of an ethnic ocommunity in the Kwara state. At an early age, he was taken to Lagos by his parents but he subsequently moved to Zaria, in the North-Central state, where he lived until the time of his death. By his will,[1] he devised each of his two houses situated in the North - Central state to each of his two younger sons. The third house situated in the Western state, together with all his residuary movable property, were also given to the two sons in equal shares. The eldest son was cut off, not with the proverbial farthing, but with five pounds. According to Moslem law, a testator must give equality of treatment to his children in his will, unless a child is not a Moslem, or he forfeits his compulsory share by killing the testator with a view to inheriting his properties,

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99. Unreported decision of the North-Central State High Court, No. Z23/67 of 30/10/68.

1. Which complied with the English Wills Act, 1837. This Act was a statute of general application in England on 1st January 1900 and therefore applies to the Northern states by virtue of s. 28 of the Northern Nigeria, High Court Law.

or consents to his compulsory share being disposed away. Probate of the will having previously been granted, the crux of the case was whether the testator could validly give more shares to the two younger sons to the detriment of the eldest. This in turn raised the question, what law determines the essential validity of the will. It was found that all the three sons of the deceased were Moslems and that the eldest son had not consented to being discriminated against.

As regards the will of movable properties of the deceased, it was held that the essential validity of a will of movables is governed by the law of domicile of the deceased at the time of his death, and that the term "essential validity" embraces the question as to whether or not the testator was bound to leave certain shares, and in what proportion, to his children. The court also held that the deceased was domiciled in the former Northern Region of Nigeria at the time of his death in August, 1965 and that his personal law, according to his lex domicilii, was the Moslem law of the Maliki school as it obtained in his ethnic community. Therefore, the rule of Moslem law which forbids discrimination among Moslem children of the testator invalidated the will since the shares of the three sons were not equal.

As regards the immovable properties of the deceased situated in Northern Nigeria and which the testator devised by the same will, the learned judge held that the essential validity of wills of immovables is governed by the law of the situs, and that the lex situs (territorially speaking) meant section 30 of the Northern Nigeria, Land Tenure Law. According to this section,

succession to a Northern Nigerian land, owned by a deceased who was a member of a tribe indigenous to that legal territory, is governed by the customary law existing in the locality in which the land is situated. The deceased was such a native and the two houses were situated in Zaria. Therefore, the Moslem Law of the Maliki sect prevailing in Zaria governed succession to the immovable properties. As we have indicated above, this law demanded equality of treatment of the three sons of the deceased. Therefore, the testator's will was intrinsically bad since it discriminated against the eldest son.

No mention was made of the validity of the same will in relation to the house situated in Western Nigeria. In his own words, the judge was only concerned with "the bequest of the two houses situated in Zaria". Obviously, this was because of the common law rule that the Northern Nigerian court has no jurisdiction over land situated outside the territorial limits of Northern Nigeria. The exception established in Re Ogunro's Estate [2] did not apply since there was no question of administration of estate involved. The effect of the judgment was that the deceased beneficiaries must commence fresh proceedings in the court of Western Nigeria in order to determine whether or not the testator's will was valid in relation to the immovable property situated in that state. It is needless to say that by such multiple proceedings in the different states, a substantial part of the testator's estate would go, not even to the two sons he contemplated in his will, but by way of litigation costs.

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2. (1960) 5 F.S.C. 137.

But had Bello J., not chosen to accept the jurisdictional limitation of the scission principle, the following consequences would have followed. He would have assumed jurisdiction to adjudicate on the succession suit on basis of presence of the disputants within Northern Nigeria, which was the obvious forum conveniens on the ground that it also constituted the jurisdiction in which the deceased died domiciled and where the majority of his assets were located. He would have adopted the choice of law approach laid down in Tapa v. Kuka[3] and decided the question of succession to the deceased estate, both movable and immovable, situated anywhere in Nigeria, according to the personal law of the deceased at the time of his death, i.e. the Moslem law of the Maliki school as found. He would have been happy to note that the same personal law would have been applied, whether by a Customary Court or the High Court, in Western Nigeria by virtue of section 2o (2) of the Customary Courts Law.[4] And finally, effect would have been given in Western Nigeria to any order of distribution made by the Northern Nigeria High Court under the provisions of the Sheriffs and Civil Process Act.[5]

There is no doubt that there must be a parting of the ways between the scission principle of the common law and the unitary system of succession favoured by customary law. The determination of which one should be

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3. (1945) 18 N.L.R. 5

4. Cap. 31, Laws of Western Nigeria (1959). Section 12 (4) of the Western Nigeria, High Court Law, Cap. 44, provides that the High Court of that state must apply s.20 of the state's Customary Courts Law in cases of inter-local conflicts between systems of customary law.

5. Cap. 189 (Fed., 1958 ed.), ss. 104-112.

jettisoned as a mere conceptual approach raises the question of the relative advantages of the two principles. As the above cases have shown, and as many writers on comparative private international law have agreed,[6] the defects, if any, of the unitary system of succession is negligible when compared with the complexities of the split system. As aptly put by Wolff.[7]

> "The advantage of the unitary rule is its greater simplicity. When the deceased leaves several immovables in different countries, these together with his movable property form a single mass, all parts of which are treated alike".

In other words, this principle pre-supposes that those who are entitled to succeed to the totality of the estate of the deceased are uniformly determined in accordance with one single territorial system of law. Adjustment of the beneficial shares, according to the doctrines of election, ademption, hotch-potch or "fard",[8] is easier to operate whenever it falls to be considered. A will is either valid intrinsically, or essentially void, according to the deceased person's personal law.

On the other hand, the scission rule, as we have frequently stated, operates on the basis that the estate of the deceased is split into two categories of movables and immovables, the rights of succession to the first part being determined by the personal law; while

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6. See e.g. Baxter, op. cit.,p. 48; Rabel, op. cit., Vol. 4, pp. 270-273 Wolff, op. cit., 2nd ed. pp. 568-569; O.C. Sommerich "Conflict of Laws with Regard to Foreign Decedent Estates" p.16, The Hague Nijhoff, 1950; 3rd International Conference of the Legal Profession International Bar Assoc., London, July 1950.

7. op. cit., 2nd ed. pp. 568-569.

8. i.e. the specific shares allocated by Moslem law to the deceased heirs.

the latter category is further dismembered into different portions according to their location. The lex situs of of each portion decides who is entitled to succeed, and in what proportion. Hence the court of a country or other legal territory may be forced by the split system to uphold the essential validity of the testator's will as regards his immovables within the forum, while ruling the same will invalid, as regards its essentials, in respect of movable property located in the same jurisdiction. It becomes clear, therefore, that to describe the scission principle as more difficult cumbrous and wasteful, is an under-statement.

With these obvious disadvantages, it might be asked why most countries in the common law world still operate the scission principle. The answer lies in the "theory of territoriality" or the "doctrine of comity", which, in turn has given rise to the principle of effectiveness. The gist of this formidable sounding doctrine, as summarily put by Professor Graveson, is the "recognition of the right of every state to exclusive control in all matters affecting land within his own territorial boundaries".[9] Therefore, the principle of effectiveness operates on the basis that any judgment affecting foreign land must ultimately be enforced by execution in the country where the land is located, and the enforcement of such judgment depends on the benevolence of the lex situs. Consequently any determination made by the personal law of the deceased as to who is entitled to succeed to a foreign immovable is a brutum fulmen in so far as is at variance with the lex situs.

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9. Graveson, op. cit.,6th ed. p. 138. See also, Dicey and Morris, op. cit.8th ed. p. 520; Wolff, op, cit. 2nd ed. p. 569.

There is some force in this argument. But whatever the position might be in the international sphere, different considerations arise with the inter-state relations in Nigeria. The theory of territoriality and the principle of effectiveness do not strictly apply between the Nigerian states as a result of constitutional arrangements. As we have shown fully in Chapter one[10] of this work, the Federal Government has by a law enacted under the Constitution, provided for the inter-state enforcement of the processes, judgments, decrees, orders and decisions of the Federal Supreme Court, or those of the High or Magistrate's court of a state, in any part of Nigeria. We have also shown that the statutory backing given to the enabling provisions of the Constitution do not fully implement the powers conferred by the Constitution, in that the processes, judgments, etc. of customary courts do not enjoy inter-state recognition under the Federal Act. Hence our suggestion that both the enabling provision of the Constitution and the Federal statute which implemented it, should be amended so as to make inter-state enforcement of judgments not only more effective, but also make their non-enforcement by any state court a breach of the Federal Constitution. But even in its present unsatisfactory form, the Sheriffs and Civil Process Act allows the judgment or order of a state High Court in Nigeria, relating to descent of land or other immovable property situated in another Nigerian state, to be enforced by way of registration at the situs of such property or in any other sister-state. And quite apart from this federal

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10. Supra p. 64.

measure, it has also been shown that the Governments of the respective states in Nigeria have demonstrated their willingness to allow unitary succession to a physically scattered immovable estate in accordance with the personal law of the deceased, in so far as descent under customary law is concerned. And that the power of the lex situs in matters of succession is limited to one of mere determination of who may occupy the land, but excluding power "to deprive any person of any beneficial interest in such land.....or in the proceeds of sale thereof, to which he may be entitled under rules of inheritance of any other customary law".[11]

If the purpose for which the scission rule exists is to provide for a just determination of the rights of succession where immovable properties of the deceased are subject to the competing rules of two countries, then it is submitted that there is no competition between the legal units in Nigeria. What we have is "false conflicts" of territorial laws, i.e. the uniform determination by different legal territories of the same legal relation. And if we accept the proposition that each sovereignty adjusts its rules of conflicts "to suit its particular domestic climate",[12] it is further submitted that the scission principle of succession should be discarded, at least, for inter-state relations as a matter of policy. The acceptance of this suggestion will cure the irrational results produced by the split system of succession in the two cases discussed above. Such a solution will also give meaning to the fact that the

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11. Supra. pp. 647-648.
12. Rabel, "An Interim Account on Comparative Conflict Laws", 46 Mich. L.R. 625 at p. 627.

Federation of Nigeria is a single national entity merely with multiple systems of territorial law.

After operating the scission principle of succession for several years, a conclusion that it is inconvenient and that it has no logical foundation to exclusive control for inter-state conflicts in a federation is the conclusion now reached by the American Restatement on the Conflict of Laws.[13] So by adopting such a solution, Nigeria will only be following the examples of some systems of law in Africa and elsewhere [14] where the existence of multiplicity or dualism of systems of law seems to have led to the adoption of

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13. Proposed Official Draft, Part III, 1969 s. 236, Comment a, p.58 where it is stated:
"The state of the situs has an obvious interest in having interest in local land decided upon intestacy in a manner that complies with its own notions of what is reasonable and just. This point, however, should not be over-emphasized. There may in the given case be other states which have an even greater interest in this question, as would probably be true of a state where the decedent and all his heirs were domiciled. Also undoubtedly all States of the United States provide for a method of distribution upon intestacy that is reasonable and just, and the differences between the laws of the several states as to the manner of division may be said to lie more in the area of detail than of principle. Hence it is unlikely that any policy of the state of the situs would be seriously infringed if interests in local land were to be decided in accordancewith the local law of another state."

14. e.g. the Federation of Malaya: See, Ong Cheng Neo v. Yap Kwan Seng (1897), Digest of Reported Cases, Federated Malay States, (1897 to 1925) 47. A similar rule is also contained in s. 12 (4) and (7) of the Small Estates (Distribution) Ord., No. 34 of 1955, of the Malay Federation; Egypt: Art. 17 of the Egyptian Civil Code provides that "inheritance, will and other dispositions taking effect after death are governed by the national law of the de cujus, the testator or the person disposing of property at death"; Ghana: The Application of the unitary principle of succession led Michelin C.J. into holding in Wilson v. Wilson (1925) Div. Ct. (1921-25) Rep. 155, that the Nigerian lex domicilii of an intestate governed succession to both his movable and immovable property situated in Ghana.

the unitary principle of succession. For instance, it has been held as early as 1897 in Ong Cheng Neo v. Yap Kwan Seng[15] that "succession to an intestate's estate, both movables and immovables, in the Federated Malay States, is determined by the lex domicilii, provided it is not contrary to public policy."

On the other hand, it must be realised that the concept of unitary succession according to the personal law of the deceased at the time of his death, is a noble idea yet to be attained at the international scene. For instance, on the basis that the following countries operate the unitary principle of succession, it may be conjectured that Congo Kinshasa, Egypt, Ghana or the Sudan may not object to the laws of a Nigerian state governing matters of succession to the immovable property situated in such country. But it is equally true that English law may not permit a Nigerian state domiciliary to create by his will a family property (which is wholly inalienable in the absence of a dispute between the beneficiaries) of a house situated in England, in accordance with his personal law at the time of his death. Neither is it conceivable that Article 390 of the Ethiopian Civil Code[16] will allow a Nigerian beneficiary, under the will of a testator who died domiciled in a Nigeria state, to inherit the testator's land situated in Ethiopia without an "Imperial Order". To designate the personal law of the deceased as the applicable law under

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15. ibid.

16. Civil Code of The Empire of Ethiopia, Proclamation No. 165 of 1960. Art. 390 provides that "No foreigner may own immovable property situate in Ethiopia except in accordance with an Imperial Order."

such circumstances is to provide for the creation of nominal rights which are virtually unenforceanle. Therefore to take account of the dissimilar positions at the inter-state and international spheres, it may be suggested that the choice of law rule in matters of succession at the inter-state level be distinguished from the international rule and stated as follows:

(a) Interstate Rule

Succession to the estate of a deceased person, whether movable or immovable, and whether held under the general law or the customary law, shall be governed by the law of the state in which he was domiciled at the time of his death.

(b) International Rule

Succession to the estate of a deceased person, whether movable or immovable, shall be governed by the law of the country in which he was domiciled at the time of his death: Provided that if the conflicts rule of the country in which his immovable property was situated at the time of his death provides for succession according to the local law, such law of location shall be applied. [17]

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17. In stating these rules, account has not been taken of the doctrine of Renvoi which is beyond the scope of this work.

POSTSCRIPT

Since the completion of this work, the Nigerian Federal Military Government has promulgated the Matrimonial Causes Decree 1970.[1] The Decree, a copy of which is made Appendix 5 of this work, came into force on 17th March 1970,[2] three days before its publication.[3] There was no advance warning of the Nigerian public of its promulgation and hence no opportunity was provided for a comment to be made on its draft provisions before they were decreed into law.

The Decree marks the first general legislation by any Nigerian Government in the field of divorce and other matrimonial causes relating to monogamous marriages. For almost a century, i.e. 1876 to 1970, successive Governments in Nigeria had refused to enact a local law on divorce and other matrimonial causes relating to monogamous marriages. Rather, they had all compelled the Nigerian Supreme or the High Courts to apply, from time to time, the current matrimonial causes law in force in England. If solely for the fact that the 1970 Decree unties, albeit belatedly, the Nigerian law from the apron strings of the English matrimonial law, it constitutes a remarkable achievement in itself.

The Decree applies throughout the federation,[4] but only in respect of monogamous marriages.[5] While it deals

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1. No. 18 of 1970.
2. See the Matrimonial Causes Decree 1970 (Appointed Day) Order 1970, L.N.26 of 1970 which accompanied the Decree as published.
3. Federal Republic of Nigeria, Official Gazette No. 15, Vol.57 of 20/3/70.
4. Matrimonial Causes Decree, s. 116 (1).
5. Ibid., s. 114 (6).

mainly with the substantive law of divorce and other matrimonial causes, several of its provisions are important from the point of view of private international law or conflict of laws. Since the Decree effects a fundamental change in some English common law, and English statutory rules of private international law hitherto applicable in Nigeria, this Postscript attempts to show in summary form, how the new Decree has affected certain aspects of this work.

1. AREA OF DOMICILE

The Decree deals with the problem discussed in Chapter Two as regards area of domicile in the Nigerian federation in two ways. First, it recognises, as has been stated in the first part of the chapter, that the law in force in Nigeria on 16th March 1970 made it clear that domicile for all purposes, including the basis of jurisdiction in matrimonial causes, was necessarily located in a state of Nigeria, as distinct from the federation as a whole.[6] However, the Decree stipulates, as from 17th March 1970, that the High Court of a State in Nigeria has jurisdiction to dissolve a monogamous marriage and entertain proceedings in other matrimonial causes relating to such a marriage, when such a proceeding is instituted "by a person domiciled in Nigeria".[7] The term "domiciled in Nigeria" is explained by section 2(3) of the Decree thus:

> "a person domiciled in any State of the Federation is domiciled in Nigeria for the purposes of this Decree and may institute proceedings under this Decree in the High Court of any State whether or not he is domiciled in that particular State".

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6. See Chapter Two, p. 102 et seq.

7. Ibid., s. 2(2) read with s. 1(1).

Domicile for the purpose of the Decree is not defined. Therefore it must be ascertained according to the principles of common law, i.e. by actual residence in a Nigerian State coupled with "the intention of remaining there permanently".[8] Only after a State domicile has been acquired in the manner described can it ripen into a Nigerian domicile under the Decree so as to enable the High Court of a State, other than that of domicile, to assume jurisdiction in respect of a petition represented by a person domiciled in another Nigerian State.

True to the common law conflict methodology, section 8 of the Decree provides that once jurisdiction has been assumed by the High Court of a State on basis of the "Nigerian domicile" of the parties, the provision of the Decree should be applied. Thus by this section, a complete harmony is achieved between choice of jurisdiction and choice of the applicable law in matrimonial causes relating to monogamous marriages. But in so far as all the High Courts of the Nigerian States appear to have ordinary jurisdiction over non-Nigerian persons who are polygamously married as well,[9] and since customary divorce laws are not uniform throughout the federation, a Nigerian domicile will be impossible to operate as a jurisdictional rule in matrimonial causes relating to polygamous marriages. Indeed, the Federal Matrimonial Causes Decree expressly excludes such marriages from the ambit of its provisions, as has been pointed out above. The net result is that the High Court of a State will have to apply different jurisdictional rule according

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8. Udom v. Udom (1960) L.L.R. 112 at p. 118.

9. See Chapter Four, p. 273.

to whether the person instituting divorce or other matrimonial proceeding is monogamously or polygamously married. It is with a view to avoiding this sort of inconvenience that we have suggested above[10] that dualism of divorce laws in Nigeria should not mean dualism of jurisdictional rules and that the High Court of any State in Nigeria should be required to assume jurisdiction over a monogamous or polygamous marriage of a Nigerian State domicilary on basis of residence, but that such court, if it is not the court of domicile of such person, should apply the law of domicile of such person in Nigeria.

A final point under this head which appears to make section 2(2) of the Decree a retrograde provision is that it dispenses, contrary to the common law rules of private international law and similar rules which have been embodied into statutory provisions in other countries,[11] with residence as basis of jurisdiction in proceedings for nullity of void or voidable marriages, judicial separation, restitution of conjugal rights and jactitation of marriage. The abrogation of the residential basis of jurisdiction for nullity of a voidable marriage might be justifiable on the ground that a nullity decree affects the status of parties to such a marriage. But to enjoin the Nigerian courts to insist on domiciliary jurisdiction to declare invalid a marriage which was celebrated in Nigeria, albeit by persons domiciled outside Nigeria, in contravention of the provisions

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10. See Chapter Four, p. 329 et seq.

11. See e.g. ss. 6(a) and 9 of the New Zealand, Matrimonial Proceedings Act, No. 71 of 1963; s. 23(5) of the Australia, Matrimonial Causes Act, No. 104 of 1959.

of section 3(1) of the Decree, i.e. for lack of proper rites, becomes difficult to justify: more so when such a nullity decree granted on the jurisdictional base of residence will be recognised in almost all foreign countries. Again, whatever might be the position as regards judicial separation,[12] a decree of restitution of conjugal rights, or jactitation of marriage, certainly does not change the status of the parties to the marriage. Why domicile, as opposed to residence, should be made the sole jurisdictional base for such decree cannot be satisfactorily explained. The ridiculous aspect of the point is that the Decree makes residence the basis of recognition of such decrees granted outside Nigeria![13]

2. SEPARATE DOMICILE OF THE WIFE AS BASIS OF MATRIMONIAL CAUSES JURISDICTION.

Another "change" in the common law rule introduced by section 7 of the Decree concerns the domicile of a married woman. The section provides that a deserted wife who was domiciled in Nigeria either immediately before her marriage or immediately before the desertion, or a wife who has been resident in Nigeria for three years prior to the institution of a matrimonial proceeding, shall be deemed to be domiciled in Nigeria for the purpose of founding the court's jurisdiction in the proceeding.

Some observations on this section are necessary. Some provisions of the Nigerian Matrimonial Causes Decree are identically phrased with some provisions of the Australian Matrimonial Causes Act 1959 as to suggest that the Nigerian

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12. Graveson, op.cit., p. 367 is of the opinion that a decree of judicial separation does not change the status of the parties to the marriage while Cheshire, op.cit., 7th ed. p.354 thinks that it might do so in certain situations.

13. Matrimonial Causes Decree 1970, s.81 (2)(b) and 81 (5).

Decree was based on the Australian Act. Section 7 of the Nigerian Decree and section 24 of the Australian Act, both of which accord a married woman a separate domicile, are such identical provisions. In view of the uncertainty already caused by the use of the word "desertion" in the Australian provision and similar provision elsewhere,[14] one would have been happy to see the ommission of that word from the section which gives a wife separate domicile. Without "desertion" anywhere being defined in the Nigerian Decree, there is the possibility that arguments will soon arise as to whether the word as used in section 7 should be construed with "desertion" as employed in section 15 (2) (d) of the Decree as a ground for divorce. In other words, it is uncertain whether desertion as a criterion for attributing a separate domicile to a wife means mere "abandonment" by her husband for less than the statutory period of desertion or is synonymous with desertion as a ground for divorce. Since it has been shown that the Nigerian provision is identical with the Australian provision, it may be expected that a similar meaning placed on the word "desertion" in the New South Wales Supreme Court's decision in Buckner v. Buckner[15] will be adopted in Nigeria.

"Residence" as used in the section is also not defined, even though "ordinary residence" is, happily, omitted. Hence the quality of the presence necessary to establish the separate domicile of wife for purpose of jurisdiction in matrimonial proceedings is not known. What

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14. See Chapter Four, p. 298 and n. 65 ; see also, the English case of Navas v. Navas [1969] 3 W.L.R. 437.

15. [1967] 1 F.L.R. 468. The case was fully discussed on p. 299 of Chapter Four.

is known is that by reading section 2(3) of the Decree with section 7, an uninterrupted presence of a wife in a state for three years will suffice as a criterion of a State domicile which automatically, on completion of the three years' residence, ripens into a Nigerian domicile. But it is uncertain whether residence in several States of Nigeria for a total period of three years entitles a wife to petition on basis of her separate domicile. Neither is it clear whether a temporary absence abroad e.g. on holidays, for few months will be fatal to the acquisition of a Nigerian domicile by such wife,[16] or whether absences for long periods, e.g. on business trips, will be considered immaterial so long as she is able to prove that she has throughout the period a continuing contact with Nigeria.[17] These questions become relevant in view of the fact that the Lagos State High Court had already held in Onwuka v. Taymani[18] that the word "resident" and cognate expressions admit of a variety of meanings depending on the intent and scope of the particular enactment, and that it must be construed as "ordinary residence" in the particular circumstances of the text the court was interpreting. If residence is to be strictly contrued, it seems that there is no justification for requiring a wife to stay in Nigeria for three years before she can start matrimonial proceedings when she has evinced a clear intention to settle animo manendi after a brief period.

Connected with the above point is the failure of the Decree, like the Australian Act, to allow a wife who is

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16. See Hopkins v. Hopkins [1951] P.116.

17. See Stransky v. Stransky [1954] P.428.

18. (1965) L.L.R. 62 at p. 75.

voluntarily or judicially separated from her husband to enjoy the benefit of a separate domicile at any time in Nigeria, except after three years residence. The absurd effect of section 7 of the Decree may be illustrated by contrasting the following two hypothetical cases with the last one.

1. A Nigerian woman was domiciled in a Nigerian State before her marriage to a man who was domiciled outside Nigeria. Both were resident in Nigeria after the marriage. (It is well recognised that the woman under such circumstances acquires the foreign domicile of her husband). If she was deserted, in the sense of being abandoned, by her husband who has now settled in his foreign country, the High Court of any Nigerian State has jurisdiction to dissolve the marriage on the basis of the Nigerian ante-nuptial domicile of the wife. The fact that she petitioned only three weeks after the husband's desertion, on the ground of his adultery with another woman in Nigeria, will be considered immaterial.
2. The facts are the same as above except that the parties went immediately after their marriage to reside in the foreign country in which the husband was domiciled. There the wife was abandoned, 18 months later, by her husband who has now acquired a new domicile in another country. The wife could come back to Nigeria and start proceedings at once in any of the Nigerian States on the basis of her ante-nuptial domicile in Nigeria.[19]

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19. Cf. Buckner v. Buckner [1967] 1 F.L.R. 468.

3. Mrs. W. was born in Ghana by a Nigerian father who was married to a Ghanaian woman. Both parents were domiciled in Ghana at the time of W.'s birth, she therefore having a Ghanaian domicile of origin. W. married a Ghanaian domiciliary. Later she obtained a decree of judicial separation from her husband in a Ghanaian court on the ground of her husband's cruelty. Her mother is now dead and her father has returned to Western Nigeria. W. joined him there and began proceedings 12 months after leaving Ghana. Under the Decree, neither the Western Nigerian High Court nor any State High Court in Nigeria could entertain her divorce petition, even though it is clear that she has evinced an intention to stay in Nigeria permanently. The fact that, by definition, she is a Nigerian, or that she has resolutely forsaken Ghana must not be considered. If she could not wait patiently for another 24 months to complete her three years residential qualification of a "deemed" domicile, she must go back to Ghana to obtain her divorce.

Similarly, the wife of a deportee from Nigeria, who does not have a Nigerian ante-nuptial domicile, cannot now, as before, petition for a matrimonial relief on the basis of the last common domicile of the spouses in Nigeria immediately before the husband's deportation. The fact that she had made up her mind not to leave Nigeria after 15 months' residence, e.g. because she is expecting a baby for a person domiciled in Nigeria and seeks the dissolution of her marriage so that she may marry him, will be of no moment to the courts. Indeed, it is still uncertain whether the period of residence stipulated

by the section must have been lived qua wife, or whether a period of residence as a feme sole should be included.[20]

Happily enough, the Decree uses the opportunity of its promulgation to dispense with the artifical restriction placed on the husband who is not domiciled in Nigeria to cross-petition in a proceeding instituted by his wife.[21]

But the above defects of the Decree are too serious for a law which comes into existence over ten years after its model, the Australian Matrimonial Act 1959, has taken effect. The provisions of the Australian Act has had the benefit of critical comments by many jurists[22] in the common law world. A whole book[23] has been written by two distinguished jurists on the provisions of the Act on conflict of laws. A Special Joint Committee of the Senate and the House of Commons in Canada[24] has had the priviledge of twenty-four sittings to consider, among others, the provisions of the Australian Act on conflict of laws with the assistance of three distinguished Canadian Professors of law, who are experts on private international law.[25] As a result of these juristic and Parliamentary analysis of section 24 of the Australian

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20. But see, e.g. the English case of Navas v. Navas [1969] 3 W.L.R. 437.

21. This follows from the definition of "petition" as including cross-petition by section 114(1)(e) of the Decree.

22. e.g. Cowen and Mendes da Costa, op.cit.; and Lucke H.K. and Kelly, D.L. Recognition of Foreign Divorces; The Time Factor in 3 Adelaide L.R. (1968) 178.

23. Cowen and Mendes da Costa, Matrimonial Causes Jurisdiction (1961), esp. Chap. 3.

24. See Proceedings of the Special Joint Committee of the Senate and House of Commons on Divorce, Nos. 1 - 24. For being able to read these proceedings, we are grateful to the Library Staff of the Canadian Embassy in London

25. viz. Professor Gordon Bale, Queen's Univ., Kingston, Ontario; Professor Stephen Skelly, University of Manitoba; and Professor Payne; in Proceedings Nos. 18, 21 and 22 respectively.

Matrimonial Causes Act, of which section 7 of the Nigerian Decree is a carbon copy, it has been discovered that the section of the Australian Act do not cover, like section 40 of the English Matrimonial Causes Act 1965 which the Nigerian Decree now rejects, the variety of circumstances under which spouses might be living in different countries as a result of a broken home. Consequently, a simple way of avoiding the defects of the Australian Act (and also the Nigerian Decree) was found in section 3(1) of the New Zealand Matrimonial Proceedings Act 1963[26]. It provides that for the purpose of establishing the jurisdiction of a court to grant a divorce or other matrimonial decree,

> "the domicile of a married woman shall be determined as if she were unmarried and, if she is a minor, as if she had attained her majority."

The New Zealand expedient has been followed in Canada[27] because, in the words of the Special Joint Committee, it represents an "extremely simple solution to this problem"[28] A similar measure is actively being considered in Kenya.[29] In short, if the Federal Government in Nigeria had wanted to give opportunity to persons outside the orbit of promulgation of Decrees to comment, as in other countries, on the draft provisions of the Matrimonial Causes Decree, perhaps the attention of the draftsmen of the Decree would have been directed to the more rational provisions of the Canadian Federation as regards how an independent domicile could be given to a wife, in a federation, for purposes of jurisdiction in

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26. No. 71 of 1963.
27. Divorce Act 1968; S. 6 (1)
28. Report of the Special Joint Committee of the Senate and House of Commons on DIVORCE (Canada), Ottawa: Queen's Printer, 1967, p.83.
29. See s. 8 (4), Draft Bill on Law of Domicil , Appendix V, Report of the Commission on Marriage and Divorce.

matrimonial causes.

The net result is that while the Decree left the jurisdictional rules in relation to the dissolution and annulment of polygamous marriages to the enlightened self-interest of individual States of the federation, it provides a national solution for half the problem of inter-state conflict by making a Nigerian domicile the basis of the courts' jurisdiction in matrimonial causes relating to monogamous marriages. In between, the Decree sandwiched, at the international sphere, a separate basis of jurisdiction in favour of a deserted wife who was domiciled in Nigeria immediately before her marriage or immediately after she was abandoned by her husband. In all other cases where a wife is living apart from her husband, she is still left helpless until after the expiration of three years' residence - a humiliating disability to which her husband is not subject.

In view of the shortcomings of the Decree as indicated above, it is submitted that its provisions relating to the jurisdictional rules of the High Courts of the Nigerian States have not been well thought out and that it should be amended on the lines proposed in our Chapters One[30] and Four[31].

3. RECOGNITION OF SISTER-STATE AND FOREIGN DECREES.

Section 80 and 81 of the Matrimonial Causes Decree deal with the problem of recognition of sister-state and foreign decrees granted in matrimonial proceedings. Like the provision dealing with the wife's separate domicile, the

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30. pp. 136 and 143.

31. pp. 329 - 341.

sections on recognition of decrees are identically phrased and set out as sections 94 and 95 of the Australian Matrimonial Causes Act 1959, dealing with the same matter in Australia. If properly considered, the Nigerian provisions on recognition could have benefitted from the foresight of the draftsmen of the relevant sections of the Australian Act, as the Nigerian Decree has shared the defects of the Australian provisions on the wife's separate domicile as basis of jurisdiction. But as will be presently shown, the mere pedantic adoption of the Australian provisions on recognition in the Nigerian Decree has some repercussion not intended by the draftsmen of the Nigerian Decree.

Section 80 of the Decree, like section 94 of the Australian Act, provides for the recognition in all the States of Nigeria of decrees granted under the Decree by the High Court of a State. To cater for a smooth transition from the old to the new law, section 81(1)[32] provides that any matrimonial decree granted by the High Court of a Nigerian State before 17th March 1970, or made after that date in a proceeding which had been instituted before 17th March but which was completed subsequently, in accordance with the law in force in Nigeria before 17th March 1970, should be recognised in all the sister-states. In this respect, sections 80 and 81 (1) dispense with registration, stipulated by the Sheriffs and Civil Process Act,[33] as a condition under which the decrees of a State's High Court should be recognised in the sister-states. This is a welcome change.

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32. Compare s. 95(1) of the Australian Act.

33. See Chapter Four, 341 - 345.

Section 81 of the Nigerian Decree, also following section 95 of the Australian Act, not only gives statutory force to the English common law rules of recognition in existence before 1959 (the date of the enactment of the Australian Act), but attempts to echo,[34] albeit inaccurately, a provision of the Australian Act[35] by making prospective "rules of private international law" on recognition of foreign decrees applicable in Nigeria. The significance of the words "rules of private international law" will be explained shortly. But first, it is proposed to consider those rules of recognition which are certain under the Nigerian Decree.

A foreign decree of dissolution or annulment of a monogamous marriage will be recognised in Nigeria if:

1. it was obtained by either party in accordance with the law of a country in which the husband was domiciled at the date of institution of the proceedings.[36] (This is a statutory enactment of the common law historic rule in Le Mesurier v. Le Mesurier.)[37]
2. it was obtained, at the instance of a deserted wife, in accordance with the law of a country in which she was domiciled immediately after the desertion, or in a country in which she was domiciled immediately before her marriage.[38] (This is a statutory enactment of the principle in Travers v. Holley.)[39]

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34. Nigerian Decree, section 81(5).
35. Australian Act, s. 95(5).
36. Nigerian Decree, s.81(2)(a); Compare, Australian Act, s.95 (2)(a)
37. [1895] A.C.517. The rule is discussed fully in Chap. Four at p. 351 - 352.
38. Nigerian Decree, s. 81(3)(a); Compare, Australian Act, s. 95(3)(a).
39. [1953] P.246. The rule is discussed fully in Chap. Four at p. 357.

3. it was obtained, at the instance of the wife, in accordance with the law of a country in which she has been resident for three years immediately before the commencement of the proceeding and in which she was, as a result, deemed to have been domiciled.[40] (This is a statutory enactment of the rule in Robinson-Scott v. Robinson-Scott[41]).

4. though not obtained in accordance with the law of a country in which the husband was domiciled or in which the wife was domiciled in the circumstances described under Rules 2 and 3 above, such decree would be recognised as valid by the law of the country in which "the parties were domiciled at the date of the dissolution" of the marriage - in effect, if it would be recognised by the lex domicilii of the husband at the commencement of the suit.[42] (This is also a statutory enactment of the rule in Armitage v. Att.-Gen.[43])

5. In the case of annulment of a void marriage only, if it was obtained in accordance with the law of a country in which one or both the parties were resident at the date of the institution of the proceedings.[44] (This appears to be an attempt to enact the rule in Mitford v. Mitford.)[45]

In operating the above rules, the courts are enjoined to proceed as follows: First, a court in Nigeria may treat

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40. Nigerian Decree, s.81(3)(b); Compare, Australian Act, s. 95(3)(b).

41. [1958] P.71. The rule is fully discussed in Chapter Four, at p.359.

42. Nigerian Decree, s. 81(4); Compare Australian Act, s.95(4).

43. [1906] P.135. The rule is fully discussed in Chap.Four p. 352

44. Nigerian Decree, s.81(2)(b); Compare Australian Act, s.95(2)(b).
s.95(2)(b).

45. [1923] P.130; see also, Corbett v. Corbett [1957] 1 W.L.R. 486; Merker v. Merker [1963] P.283.

as proved any fact found by the court of a foreign country, or established before such a court, for the purpose of the law of the foreign country.[46] Thus, for example, recognition of a foreign divorce decree needs not be predicated upon proof of proper jurisdiction, based on domicile, by such a foreign court. If the judgment of the foreign court shows on the face of it that jurisdiction was assumed on basis of domicile, the fact that a Nigerian court would not have held, under similar circumstances, the party or parties domiciled in such country, should not be fatal to recognition.

Secondly, a Nigerian court must refuse recognition to a foreign decree, except that based on the wife's separate domicile as described above, if a "party to the marriage had been denied natural justice or ... the dissolution or annulment had been obtained by fraud."[47]

Thirdly, the term "foreign country" as used in formulating the recognition provisions means a territory outside Nigeria which is subject to one system of law. Therefore in reference to a country which is a federation, it means a part of such federation.[48]

The problematic provision of the Decree is contained in section 81(5) which omits two vital words in adopting section 95(5) of the Australian Act. Section 81(5) of the

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46. Matrimonial Causes Decree, 81(6); Compare s. 95(6) of the Australian Act.

47. Nigerian Decree, s.81 (7); Compare Australian Act at s. 95(7).

48. Nigerian Decree, s. 81 (9); Compare Australian Act at s. 95(9).

Nigerian Decree provides:

> "Any dissolution or annulment of a marriage that would be recognised as valid under the rules of private international law[49] but to which none of the preceding provisions of this section applies shall be recognised as valid in Nigeria, and the operation of this subsection shall not be limited by any implication from those provisions."

The Australian version is stated at section 95(5) of the Matrimonial Causes Act 1959 thus:

> "Any dissolution or annulment of a marriage that would be recognised as valid under the common law rules of private international law[50] but to which none of the preceding provisions of this section applies shall be recognised as valid in Australia, and the operation of this subsection shall not be limited by any implication from those provisions."

The main question concerning the Nigerian provision is, which rules private international law is contemplated? At least the Australian provision makes a specific reference to "the common law rules of private international law", a phrase which is generally acknowledged to be a reference to the rules of English private international law.[51] Is the omission of the words "common law" from the Nigerian provision accidental or deliberate?

In any event, the phrase "rules of private international law" contained in the Nigerian Matrimonial Causes

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49. Emphasis supplied.

50. Emphasis supplied.

51. See Alexsandro v. Alexsandro [1967] 12 F.L.R. 360. Even before the decision in this Australian case, it has been the view of commentators on the subsection of the Australian Act that the phrase refers to the rules of English private international law. See e.g. Cowen & Mendes da Costa, op.cit., at pp. 83 and 93; Lucke, H.K. & Kelly, D.L. "Recognition of Foreign Divorces: The Time Factor" in 3 Adelaide L.R. (1968) 178 at p.185.

Decree is capable of at least four interpretations. First, it might be argued that it is a reference to the rules of private international law being applied universally by all nations. We have shown in Chapter One of this work[52] that no body of private international law exists which applies to all countries. Secondly, it may mean the rules of private international law as being applied by the common law countries of which Nigeria is one. This interpretation is also inconvenient as it may involve a clash between principles, e.g. American Conflicts rules and rules established in the Commonwealth countries. Indeed, the question might be asked how common is the common law between the Commonwealth countries?

Thirdly, the phrase might mean "such rules of private international law as might subsequently be established by the Nigerian High Courts". This interpretation is possible but is inconsistent with the fact that the rules of recognition incorporated in the Nigerian Matrimonial Causes Decree are common law rules established by the English courts. Finally, the phrase "rules of private international law" might be construed as indicative of the intention of the makers of the Decree to allow any rule of recognition subsequently established in England, after the commencement of the Decree, to be applied in Nigeria. As has been stated, this is how the similar provision of the Australian Matrimonial Causes Act is understood. This interpretation seems plausible in respect of the Nigerian provision, even though it omits the vital words "common law" from the section, in as much as the specific

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52. Supra. p. 19 et seq.

rules of recognition contained in the Decree are common law rules.

Since it was enacted in 1959, the recognition provisions of the Australian Matrimonial Causes Act made a list of the common law rules of recognition which were in existence in England in 1959. It is therefore understandable that it stopped with the principle established in 1958 in Robinson-Scott v. Robinson-Scott.[53] Until the 16th of March 1970, the Nigerian High Courts were enjoined to exercise their jurisdiction in matrimonial causes relating to monogamous marriages in accordance with the law for the time being in force in England.[54] This situation would seem to suggest that English rules of recognition up to that date should normally operate in Nigeria so that the jurisdictional rules of the High Courts will complement their recognition rules. The Nigerian Matrimonial Causes Decree was promulgated in March 1970 and yet, it too, like the Australian Act, lists the rule of recognition which obtained in England in 1959. In other words, unlike the Australian Matrimonial Act 1959, the Nigerian Matrimonial Causes Decree 1970 is not up to date in the list of common law rules of recognition which it incorporates. For example the principle established by the House of Lords in Indyka v. Indyka[55] and other rules established by the subsequent decisions which interpreted the rationes decidendi of Indyka's case, are not part of the specific rules incorporated by the Nigerian Decree.

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53. [1958] P.71.

54. S.4 of the States Courts (Federal Jurisdiction) Act. This section of the Act has now been repealed by s. 115(2)(d) of the Matrimonial Causes Decree 1970.

55. [1962] 3 W.L.R. 510.

There can only be one explanation for this anomalous situation. Sections 80 and 81 of the Nigerian Decree are not merely verbatim adoption of sections 94 and 95 of the Australian Act: the Nigerian provisions were "drafted" by a person or a group of persons whose knowledge of Nigerian or English private international law is limited. Hence the disappointing lack of awareness that the common law rules of recognition have been greatly enlarged since 1967, that the phrase "rules of private international law" as employed in sub-section 81(5) of the Decree is not only vague but meaningless, and that the words "common law" which precede such phrase in sub-section 95(5) of the Australian Act have an especial significance and therefore should not have been omitted either deliberately or inadvertently.

Now, we have narrowed the interpretation of sub-section 81(5) of the Decree to two possibilities, viz. that the sub-section is a general directive to the Nigerian High Courts to establish new rules of recognition in future cases as the justice of the particular situation demands, or that any common law rules of recognition established in England after 1959 (after Robinson-Scott's case) should be applied in Nigeria. According to the first interpretation, only the recognition rules listed above are operative in Nigeria. But if, as is more probably the case, sub-section 81(5) imports the rules established in England after Robinson-Scott's case into Nigeria, it means that the present rules of recognition of decrees of divorce[56] and anhulment

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56. The common law rules for the recognition of foreign divorce decrees are fully discussed in Chapter Four at p.363 - 389.

of monogamous marriages obtaining in England are part of the Nigerian law. Also, subsequent common law rules of recognition established in England will still apply in Nigeria.

It is, of course, needless to say that the uncertainties revealed by the recognition provisions of the Nigerian Decree bring home forcefully the point that an uncritical adoption of a foreign statute to regulate matters of conflict of laws in Nigeria may create more difficulties than those the foreign statute is designed to solve. Also, these difficulties of interpretation and the fact that the provisions of the Decree do not apply to the recognition of foreign dissolution and annulment of polygamous marriages[57] emphasise the point that the mere fact that a solution has been tried and found successful in a federation does not necessarily mean that such expedient should not be properly considered before it is foisted on the citizens of the federation of Nigeria. Besides being a federation, the dualism of systems of territorial and non-territorial (customary) law in each of the Nigerian States makes the Nigerian position rather unique.

Since the recognition provisions of the Decree, like its provisions on basis of jurisdiction of the Nigerian courts, relate exclusively to the recognition of foreign decrees given in respect of monogamous marriages, each Nigerian State is left to work out what rules should be applied for the recognition of foreign decrees dissolving or annulling polygamous marriages. Undoubtedly the limitation imposed on its own effect by the Matrimonial Causes Decree is justified by the Constitutional allocation of legislative competence whereby all

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57. S.114(6).

matters regarding monogamous marriages are reserved for the Federal Government, while matters concerning polygamous marriages are within the legislative competence of each State Government. Since the provisions of the Federal Matrimonial Causes Decree on conflict of laws are not clear, and probably not up to date, it is to be expected that most States will not follow the provisions in enacting recognition rules in respect of foreign dissolution and annulment of polygamous marriages. Indeed, as we have pointed out repeatedly, a "Nigerian domicile" as basis of jurisdiction for the dissolution and annulment of polygamous marriages is an impossible proposition at present in view of the diversity of customary divorce laws in Nigeria. The result is that by the promulgation of the Matrimonial Causes Decree 1970, we in Nigeria have now adopted an unprecedented and unique experiment of having two bodies of private international law, one relating to the institutions of the common law, the other governing the institutions of our indigenous customary laws.

It is accordingly suggested that an urgent amendment of the provisions of the Decree on recognition of foreign decrees is necessary. Some guide lines have been provided in Chapter Four of this work.[58] Furthermore, perhaps an ultimate solution would be the repeal of the conflict provisions of the Matrimonial Causes Decree 1970. In its place would be a Code of Nigerian private international law subsequently to be worked out by a National Committee on Law Reform. The Committee should be made up of persons who have made a specialised study of the local circumstances in Nigeria

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58. Supra. p. 393.

and know more than one approach to conflictual problems. From this specialised knowledge they would be able to devise some conflict rules which will cater for the institutions of the common law and the customary law in Nigeria. The Code subsequently produced would be revised periodically so as to take account of legal developments in Nigeria and the world around it.

4. LEGITIMACY IN THE DOMESTIC LAW OF NIGERIA

The Matrimonial Causes Decree 1970 also effects some slight change in the mode of establishing legitimacy which is alleged to have arisen as a result of birth in lawful monogamous marriage. We saw in Chapter Four[59] that section 147 of the Evidence Act was a statutory enactment of the rule of common law established in Russell v. Russell.[60] Under the section, a child born by a woman during the subsistence of her monogamous marriage or within 280 days after its dissolution, the woman remaining unmarried, was "conclusively" presumed to be the legitimate child of the woman's husband, or former husband, as the case may be. By the same section, these so-called conclusive presumptions of legitimacy could be rebutted by either the husband or the wife giving evidence of non-access at the time the child could have been conceived. Neither spouse could, however, adduce oral or documentary evidence of absence of sexual intercourse to show that the child was not the legitimate issue of the husband.

Section 115(3) of the Decree preserves the presumptions contained in section 147 of the Evidence Act,

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59. Supra pp. 405 - 406.

60. [1924] A.C. 687.

but dispenses with their conclusive nature. Further, it is provided in section 84 of the Decree that

> "Notwithstanding any rule of law, in proceedings under this Decree either party to a marriage may give evidence proving or tending to prove that the parties to the marriage did not have sexual relations with each other at any particular time, but shall not be compellable to give such evidence if it would show or tend to show that a child born to the wife during the marriage was illegitimate".

This is a good step forward on a similar line suggested in Chapter Five of this work.[61]

However, the Decree does not say what happens when a spouse volunteers evidence of absence of sexual intercourse in order to bastardise a child presumed legitimate under section 147 of the Evidence Act and the other spouse alleges in his or her own evidence that sexual intercourse did take place. Presumably a court faced with such conflictual evidence would merely allow the presumptions to operate as if there had been no dispute between the parties about the legitimacy of the child. Or could the court now order a blood test?

A second change in the law made by the Matrimonial Causes Decree as regards the question of legitimacy of a person is contained in section 38. Sub-section (1) enacts the common law rule that a decree annulling a voidable marriage shall operate as if the marriage had been void ab initio. Sub-section (2), however, preserves the legitimacy of any child born during such a marriage by providing that such decree shall not render illegitimate "a child of the parties born since, or legitimated during, the marriage".

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61. Supra. p. 428.

The Decree leaves unresolved the problem of a child of a void marriage which the common law says is always illegitimate. Perhaps this is not a serious omission after all, if we are correct in our submission in Chapter Six[62] that legitimacy, whether arising out of a birth in a valid or ostensible monogamous marriage, or whether it emanates from birth in lawful polygamous marriage, is a matter within the legislative competence of the State under the constitutional allocation of legislative powers between the federal and the state Governments. In other words, in so far as sections 38, 84 and 115(3) of the Matrimonial Causes Decree are provisions on legitimacy, their promulgation appears ultra vires the powers of the Federal Government.

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62. Supra p. 498 et seq.

APPENDIX A

ENGLAND

CODE OF THE LAW OF DOMICILE

Article 1

(1) Every person shall have a domicile but no person shall have more than one domicile at the same time.

(2) A domicile is either a domicile of origin or a domicile of choice.

(3) A domicile of origin is the domicile assigned to every person at his birth in accordance with the provisions of Article 4(1) of this Code.

(4) A domicile of choice is the domicile acquired through the exercise of his own will by a person who is legally capable of changing his domicile, or a domicile acquired by virtue of an order or with the approval of a court of competent jurisdiction in accordance with Article 4(3) or Article 5 of this Code.

(5) A domicile, whether of origin or of choice, shall continue until another domicile is acquired.

Article 2

(1) Subject to the provisions of this Code, the domicile of a person shall be in the country in which he has his home and intends to live permanently.

(2) Unless a different intention appears, the following are rules for ascertaining a person's intention to live permanently in a country:-

Rule 1: Where a person has his home in a country, he shall be presumed to intend to live there permanently.

Rule 2: Where a person has more than one home, he shall be presumed to intend to live permanently in the country in which he has his principal home.

Rule 3: Where a person is stationed in a country for the principal purpose of carrying on a business, profession or occupation and his wife and children (if any) have their home in another country, he shall be presumed to intend to live permanently in the latter country.

(3) Paragraph (2) shall not apply to persons entitled to diplomatic immunity or in the military, naval, air force or civil service of any country, or in the service of an international organisation.

Article 3

The domicile of a married woman shall be that of her husband: Provided that a married woman who has been separated from her husband by the order of a court of competent jurisdiction shall be treated as a single woman.

Article 4

(1) Subject to Articles 1 and 5 of this Code, the domicile of an infant shall be -

(i) that of his father, if the infant is legitimate or legitimated, provided that, as from the termination of the marriage of his parents, an infant's domicile shall be that of the person (if any) in whom the custody of the infant is from time to time lawfully vested or, if it is vested in more than one person, that of such one of them as they may agree;

(ii) that of his mother, if the infant is illegitimate;

(iii) that of the adopter, if the infant has been lawfully adopted, so however that where an infant has been lawfully adopted jointly by two spouses he shall, for the purposes of this Code, be treated as if he were a legitimate child of the marriage.

(2) If any such person as is referred to in the proviso to paragraph 1(1) of this Article changes his domicile, the domicile of the infant shall not thereby be changed unless that person so intends.

(3) Notwithstanding anything herein contained, a court of competent jurisdiction shall have power to make such provision for the purpose of varying an infant's domicile as it may deem appropriate to the welfare of the infant.

(4) "Infant" means a person who has not attained the age of 21 years and who has not married.

Article 5

A lunatic shall retain during lunacy the domicile which he had immediately before he became a lunatic: Provided that the person or authority in charge of the lunatic shall have power to change the lunatic's domicile with the approval of a court of competent jurisdiction in the country in which the lunatic is domiciled.

APPENDIX B

CANADA

DRAFT MODEL ACT TO REFORM AND CODIFY THE LAW OF DOMICILE

1. This Act may be cited as the Domicile Code.

2. This Act replaces the rules of the common law for determining the domicile of a person.

3. In this Act, unless the context otherwise requires, "mentally incompetent person" means ....

4. (1) Every person has a domicile.

   (2) No person has more than one domicile at the same time.

   (3) The domicile of a person shall be determined under the law of the province.

   (4) The domicile of a person continues until he acquires another domicile.

5. (1) Subject to section 6, a person acquires and has a domicile in the state and in the subdivision thereof in which he has his principal home and in which he intends to reside indefinitely.

   (2) Unless a contrary intention appears,

      (a) a person shall be presumed to intend to reside indefinitely in the state and subdivision where his principal home is situate; and

      (b) a person shall be presumed to have his principal home in the state and subdivision where the principal home of his spouse and children (if any) is situate.

   (3) Subsection (2) does not apply to a person entitled to diplomatic immunity or in the military, naval or air force of any country or in the service of an international organization.

6. The person or authority in charge of a mentally incompetent person may change the domicile of the mentally incompetent person with the approval of a court of competent jurisdiction in the state and subdivision thereof in which the mentally incompetent person is resident.

7. This Act comes into force on a day to be fixed by the Lieutenant-Governor by his proclamation.

APPENDIX C

KENYA

DRAFT BILL ON LAW OF DOMICIL

A Bill for

An Act to Declare and Amend the Law relating to Domicil

Short title

1. This Act may be cited as the Law of Domicil Act 196.

Interpretation

2. In this Act -

"country" means a sovereign state, except where the law of the state recognises that different domicils attach to different parts of that state, when it means any such part.

Domicil of origin

3. Every person shall acquire at the date of his birth -

(a) if he is born legitimate or deemed to be legitimate, the domicil of his father, or if he is born posthumously, the domicil which his father had at the date of his death;

(b) if he is born illegitimate, the domicil of his mother.

Foundlings

4. An infant who is a foundling shall acquire domicil in the country where he is found.

Legitimation

5. An infant who is legitimated by the marriage of his parents shall acquire the domicil of his father at the date of the legitimation.

Adoption

6. An infant whose adoption has been authorised by a court of competent jurisdiction or recognised by a declaratory decree of such a court shall, as from the date of the order or decree, acquire the domicil of the adopter or, where he is adopted by two spouses, that of the husband.

Marriage

7. A woman shall, on marriage, acquire the domicil of her husband.

Domicil of Choice

8. (1) where a person, not being under any disability, takes up residence in a country other than that of his domicil with the intention of making that country his permanent home, or where, being resident in a country other than that of his domicil, he decides to make that country his permanent home, he shall, as from the date of so taking up residence or of such decision, as the case may be, acquire domicil in that country and shall cease to have his former domicil.

(2) A person may intend or decide to make a country his permanent home even though he contemplates leaving it should circumstances change.

(3) An adult married woman shall not, by reason of being married, be incapable of acquiring an independent domicil of choice.

(4) The acquisition of a domicil of choice by a married man shall not, of itself, change the domicil of his adult wife or wives, but the fact that a wife is present with

her husband in the country of his domicil of choice at the time when he acquires that domicil or subsequently joins him in that country shall raise a rebuttable presumption that the wife has also acquired that domicil.

Consequential change of domicil

9. (1) Subject to the provisions of sub-sections (2) and (3) of this section, the domicil of an infant shall change -

(a) where the infant was born legitimate or is deemed to be legitimate or has been legitimated, with that of his father; and

(b) where the infant is illegitimate, with that of his mother:

Provided that where the custody of an infant has been entrusted to his mother by decree of a court of competent jurisdiction, his domicil shall not change with that of his father but shall change with that of his mother.

(2) The domicil of an infant female who is married shall change with that of her husband.

(3) the domicil of an infant, other than a female who is married, whose adoption has been authorised by a court of competent jurisdiction or recognised by a declaratory decree of such a court, shall change with that of his adopter or, where he was adopted by two spouses, that of the husband.

Unity and continuity of domicil

10. (1) No person may have more than one domicil at any time and no person may be without a domicil.

(2) A person retains his domicil until he acquires a new domicil notwithstanding that he may have left the country of his domicil with the intention of never returning.

Cessation of application of Part II of the Indian Sucession Act.

11. Part II of the Succession Act, 1865, of India shall cease to extend or apply to Kenya.

UNITED NATIONS

ECONOMIC AND SOCIAL COUNCIL

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13 January 1967

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COMMISSION ON HUMAN RIGHTS
SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES
Item 4 of the agenda

STUDY OF DISCRIMINATION AGAINST PERSONS BORN OUT OF WEDLOCK

GENERAL PRINCIPLES ON EQUALITY AND NON-DISCRIMINATION IN RESPECT OF PERSONS BORN OUT OF WEDLOCK

Text adopted by the Sub-Commission

Preamble

Whereas the peoples of the world have, in the Charter of the United Nations, proclaimed their determination to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to promote social progress and better standards of life in larger freedom,

Whereas the Charter sets forth, as one of the purposes of the United Nations, the promotion and encouragement of respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Whereas the Universal Declaration of Human Rights proclaims that all human beings are equal in dignity and rights and, elaborating the principle of non-discrimination, further proclaims that everyone is entitled to all the rights and freedoms set forth therein without distinction of any kind,

Whereas the principle of the same social protection for all children, whether born in or out of wedlock, has been proclaimed in article 25, paragraph 2, of the Universal Declaration of Human Rights and confirmed by article 10, paragraph 3, of the Covenant on Economic, Social and Cultural Rights and by article 24 of the Covenant on Civil and Political Rights,

Whereas a sizable portion of the population of the world is composed of persons born out of wedlock many of whom, because of the nature of their birth, are the victims of legal or social discrimination in violation of the principles of equality and non-discrimination set out in the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Racial Discrimination and the International Covenants on Human Rights,

Whereas efforts should be made, through all possible means, to promote respect for the inherent dignity and worth of the human person, so as to enable all members of society, including persons born out of wedlock, to enjoy the equal and inalienable rights to which they are entitled,

Now therefore, with a view to eliminating this form of discrimination, the following general principles are proclaimed:

Part I

1. Every person born out of wedlock shall be entitled to legal recognition of his maternal and paternal filiation in so far as compatible with the principle of the protection of the family.

2. The fact of birth of a child shall by itself establish maternal filiation to the whoman who gives birth to the child.

3. The establishment of paternal filiation shall be provided for by laws through a variety of means, including acknowledgement, recognition of legal presumptions and judicial decision. Judicial proceedings to establish paternal filiation shall not be subject to any time-limits.

4. The husband shall be presumed to be the father of any child born to his wife whether he is conceived or born during the marriage. This presumption may be overcome only by a judicial decision based upon evidence that the husband is not the father. Proceedings to that end shall be initiated within a limited period of time.

5. Any child born of parents who intermarry after the birth of that child shall be considered to be born of that marriage.

6. Every person born in wedlock, or considered to be born in wedlock as a result of the subsequent marriage of his parents, shall retain his status notwithstanding the invalidity or annulment of the marriage.

/...

Part II

7. Every person, once his filiation has been established, shall have the same legal status as a person born in wedlock.

8. Every person born out of wedlock whose filiation is established in relation to both parents shall have the right to bear a surname determined as in the case of a person born in wedlock. If his filiation is established in relation only to his mother, he shall be entitled to bear her surname, modified, if necessary, in such a manner as not to reveal the fact of birth out of wedlock.

9. The rights and obligations pertaining to parental authority shall be the same, whether the child is born in wedlock or out of wedlock. Unless otherwise decided by the court in the best interest of the child born out of wedlock, parental authority shall be exercised according to the same rules as for a child born in wedlock if his filiation is established in relation to both parents, or by his mother alone if his paternal filiation is not established.

10. The domicile of any child born out of wedlock whose filiation is established in relation to both parents shall be determined according to the same rules as for children born in wedlock.

If the filiation is established to the mother alone, appropriate rules shall ensure in any case that the child has a domicile.

11. Every person born out of wedlock shall, once his filiation has been established, have the same maintenance rights as persons born in wedlock. Birth out of wedlock shall not affect the order of priority of claimants.

12. Every person born out of wedlock shall, once his filiation has been established, have the same inheritance rights as persons born in wedlock. Legal limitations or restrictions on the freedom of a testator to dispose of his property shall afford equal protection to persons entitled to inheritance, whether they are born in wedlock or out of wedlock.

13. The nationality or citizenship of a person born out of wedlock shall be determined by the same rules as those applicable to persons born in wedlock.

Special protection against statelessness shall be provided for persons born out of wedlock. In particular, when only the maternal filiation of a person born out of wedlock is established, its effects shall be the same as in the case of paternal filiation.

/...

14. Political, social, economic and cultural rights shall be enjoyed equally by all persons, whether they are born in wedlock or out of wedlock, without prejudice, as regards social welfare services, to the special care which shall be provided to children born out of wedlock and their mothers, by the State or society, when necessary.

Part III

15. Information in birth and other registers containing personal data which might disclose the fact of birth out of wedlock shall be available only to persons or authorities having a legitimate interest with respect to filiation.

In referring to persons born out of wedlock, any designation which might carry a derogatory connotation shall be avoided.

16. The adoption of a child born out of wedlock shall be subject to the same rules and provisions and shall have the same consequences as the adoption of children born in wedlock.

Restrictions on the right to adopt shall be limited to such requirements as are necessary to establish a parent-child relationship and to assure the best interests of the adoptee. In particular, no restrictions based solely on a difference of race, colour or national origin shall be permitted.

Adoption procedure should be carried out under the supervision of the State and/or a competent social welfare agency to ensure full protection of the child and his well-being.

Supplement to Official Gazette Extraordinary No. 15, Vol. 57, 20th March, 1970—Part A

A 61

MATRIMONIAL CAUSES DECREE 1970

ARRANGEMENT OF SECTIONS

ARRANGEMENT OF SECTIONS—*continued*

ARRANGEMENT OF SECTIONS—*continued*

Decree No. 18

[*Section* 116 (2)] Commencement.

THE FEDERAL MILITARY GOVERNMENT hereby decrees as follows :—

PART I—JURISDICTION

Institution of matrimonial cause proceedings only under this Decree.

1.—(1) After the commencement of this Decree a matrimonial cause shall not be instituted otherwise than under this Decree ; and if a matrimonial cause has been instituted before the commencement of this Decree but not completed, it shall be continued and dealt with only in accordance with the provisions of this Decree prescribed in that behalf.

(2) Where before or after the commencement of this Decree a matrimonial cause has been or is instituted, and whether or not it has been completed, proceedings in relation thereto for any relief or order of a kind that could be sought under this Decree shall be instituted after the commencement of this Decree only under this Decree, so however that, subject to the succeeding provisions of this and the next section—

(*a*) any jurisdiction of a court of summary jurisdiction of a State or of a court on appeal from such a court, under the law of that State, to make—

(*i*) orders with respect to the maintenance of wives or children or the custody of or access to children ; or

(*ii*) separation orders or other orders having the effect of relieving a party to a marriage from any obligation to cohabit with the other party,

shall not be affected by this Decree or any proceedings thereunder ; and

(*b*) proceedings for or in respect of such an order, or for its enforcement, may be continued or instituted as if this Decree had not been made.

(3) Where a marriage is dissolved or annulled by a decree of a court of competent jurisdiction under this Decree—

(*a*) any jurisdiction of such a court or of a court on appeal from such a court, to make orders of the kind specified in subsection (2) (*a*) above shall, by virtue of this subsection, cease to be applicable in relation to the parties to the marriage or the children of the marriage ; and

(*b*) any order of that kind (unless it is a maintenance order, when subsection (5) below will apply) made by such a court in relation to those parties or children shall cease to have effect.

(4) A court in the exercise of its jurisdiction under this Decree may at any time by order direct that an order of the kind specified in subsection (2) (*a*) above made by a court of summary jurisdiction, or by a court on appeal from such a court, shall cease to have effect ; and that order shall cease to have effect accordingly.

(5) Where an order of the kind specified in subsection (2) (*a*) above made with respect to the maintenance of a wife or of children ceases to have effect under subsection (3) or (4) above, the order made may, in so far as it relates to any period before it so ceased to have effect, be enforced as if this Decree had not been made.

Jurisdiction in matrimonial causes.

2.—(1) Subject to this Decree, a person may institute a matrimonial cause under this Decree in the High Court of any State of the Federation, and for that purpose the High Court of each State of the Federation shall have jurisdiction to hear and determine—

(*a*) matrimonial causes instituted under this Decree ; and

(*b*) matrimonial causes (not being matrimonial causes to which section 101 of this Decree applies) continued in accordance with the provisions of Part IX of this Decree, so however that jurisdiction under this Decree in respect of matrimonial causes within this paragraph shall be restricted to the court in which the matrimonial cause was instituted,

and in any case where maintenance is ordered in proceedings in a High Court, a court of summary jurisdiction in any State shall have jurisdiction to enforce payment in a summary manner.

(2) Proceedings for a decree—

(*a*) of dissolution of marriage ; or

(*b*) of nullity of a voidable marriage ; or

(*c*) of nullity of a void marriage ; or

(*d*) of judicial separation ; or

(*e*) of restitution of conjugal rights ; or

(*f*) of jactitation of marriage,

may be instituted under this Decree only by a person domiciled in Nigeria.

(3) For the avoidance of doubt it is hereby declared that a person domiciled in any State of the Federation is domiciled in Nigeria for the purposes of this Decree and may institute proceedings under this Decree in the High Court of any State whether or not he is domiciled in that particular State.

Void marriages and prohibited degrees of consanguinity.

3.—(1) Subject to the provisions of this section, a marriage that takes place after the commencement of this Decree is void in any of the following cases but not otherwise, that is to say, where—

(*a*) either of the parties is, at the time of the marriage, lawfully married to some other person;

(*b*) the parties are within the prohibited degrees of consanguinity or, subject to section 4 of this Decree, of affinity;

(*c*) the marriage is not a valid marriage under the law of the place where the marriage takes place, by reason of a failure to comply with the requirements of the law of that place with respect to the form of solemnization of marriages;

(*d*) the consent of either of the parties is not a real consent because—

(*i*) it was obtained by duress or fraud; or

(*ii*) that party is mistaken as to identity of the other party, or as to the nature of the ceremony performed; or

(*iii*) that party is mentally incapable of understanding the nature of the marriage contract;

(*e*) either of the parties is not of marriageable age.

(2) The prohibited degrees of consanguinity and affinity respectively on and after the commencement of this Decree shall be those set out in Schedule 1 to this Decree, and none other.

(3) A marriage solemnized before the commencement of this Decree shall not be voidable on the grounds of consanguinity or affinity of the parties unless the parties were, at the time of the marriage, within one of the degrees of consanguinity or affinity set out in Schedule 1 to this Decree; but nothing in this subsection shall make voidable a marriage that would not, apart from this provision, be voidable.

Marriage of persons within prohibited degrees of affinity.

4.—(1) Where two persons who are within the prohibited degrees of affinity wish to marry each other, they may apply, in writing, to a judge for permission to do so.

(2) If the judge is satisfied that the circumstances of the particular case are so exceptional as to justify the granting of the permission sought he may, by order, permit the applicants to marry one another.

(3) Where persons marry in pursuance of permission granted under this section, the validity of their marriage shall not be affected by the fact that they are within the prohibited degrees of affinity.

(4) The Head of the Federal Military Government may arrange with the Military Governor or Administrator of a State for the performance by judges of the High Court of that State of functions under this section.

(5) In this section, "judge" means a judge in respect of whom an arrangement made under subsection (4) above is applicable.

(6) Rules made under section 112 of this Decree may make provision for the practice and procedure in and in connection with applications under

this section, and may include provision for or in relation to the summoning of witnesses, the production of documents, the taking of evidence on oath or affirmation, and the payment of expenses of witnesses.

Voidable marriages.

5.—(1) Subject to this Decree, a marriage that takes place after the commencement of this Decree not being a marriage that is void, shall be voidable in the following cases but not otherwise, that is to say, where at the time of the marriage—

(*a*) either party to the marriage is incapable of consummating the marriage;

(*b*) either party to the marriage is—

(*i*) of unsound mind; or

(*ii*) a mental defective; or

(*iii*) subject to recurrent attacks of insanity or epilepsy;

(*c*) either party to the marriage is suffering from a venereal disease in a communicable form; or

(*d*) the wife is pregnant by a person other than the husband.

(2) For the purposes of this section, "mental defective" means a person who, owing to an arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury, requires oversight, care or control for his own protection or for the protection of others and is, by reason of that fact, unfitted for the responsibilities of marriage.

Validity, etc. of certain marriages not affected.

6.—(1) Save as expressly provided in this Part of this Decree, nothing in this Part shall affect the validity or invalidity of a marriage that took place before the commencement of this Decree.

(2) A provision of this Decree shall not affect the validity or invalidity of a marriage where it would not be in accordance with the rules of private international law to apply that provision in relation to that marriage.

Special provisions as to wife's domicile.

7. For the purposes of this Decree,—

(*a*) a deserted wife who was domiciled in Nigeria either immediately before her marriage or immediately before the desertion shall be deemed to be domiciled in Nigeria; and

(*b*) a wife who is resident in Nigeria at the date of instituting proceedings under this Decree and has been so resident for the period of three years immediately preceding that date shall be deemed to be domiciled in Nigeria at that date.

Law to be applied.

8. The jurisdiction conferred on a court by this Decree shall be exercised in accordance with this Decree; and any law in force immediately before the commencement of this Decree which confers jurisdiction in divorce or matrimonial causes on the High Court of a State or provides for the law and practice to be applied in the exercise of that jurisdiction shall, to the extent that it does so, cease to have effect.

Staying and transferring of proceedings.

9.—(1) Where it appears to a court in which a matrimonial cause has been instituted under this Decree that a matrimonial cause between the parties to the marriage or purported marriage has been instituted in another court having jurisdiction under this Decree, the court may in its discretion stay the matrimonial cause for such time as it thinks fit.

(2) Where it appears to a court in which a matrimonial cause has been instituted under this Decree (including a matrimonial cause in relation to which subsection (1) above applies) that it is in the interests of justice that the matrimonial cause be dealt with in another court having jurisdiction to hear and determine that cause, the court may transfer the matrimonial cause to the other court.

(3) The court may exercise its powers under this section at any time and at any stage either on application by any of the parties, or of its own motion.

(4) Where a matrimonial cause is transferred from a court in pursuance of this section—

(*a*) all documents filed of record in that court shall be transmitted by the registrar or other proper officer of that court to the registrar or other proper officer of the court to which the cause is transferred; and

(*b*) the court to which the cause is transferred shall proceed as if the cause had been originally instituted in that court, and as if the same proceedings had been taken in that court as had been taken in the court from which the cause was transferred; but all subsequent proceedings shall be in accordance with the practice and procedure of the court to which the cause is transferred.

Courts to aid one another.

10. All courts having jurisdiction under this Decree shall severally act in aid of and be auxiliary to one another in all matters under this Decree.

PART II—MATRIMONIAL RELIEF

Reconciliation

Reconciliation.

11.—(1) It shall be the duty of the court in which a matrimonial cause has been instituted to give consideration, from time to time, to the possibility of a reconciliation of the parties to the marriage (unless the proceedings are of such a nature that it would not be appropriate to do so), and if at any time it appears to the judge constituting the court, either from the nature of the case, the evidence in the proceedings or the attitude of those parties, or of either of them, or of counsel, that there is a reasonable possibility of such a reconciliation, the judge may do all or any of the following, that is to say, he may—

(*a*) adjourn the proceedings to afford those parties an opportunity of becoming reconciled or to enable anything to be done in accordance with either of the next two succeeding paragraphs;

(*b*) with the consent of those parties, interview them in chambers, with or without counsel, as the judge thinks proper, with a view to effecting a reconciliation;

(*c*) nominate a person with experience or training in marriage conciliation, or in special circumstances, some other suitable person, to endeavour with the consent of the parties, to effect a reconciliation.

(2) If, not less than fourteen days after an adjournment under subsection (1) above has taken place, either of the parties to the marriage requests that the hearing be proceeded with, the judge shall resume the hearing, or the proceedings may be dealt with by another judge, as the case may require, as soon as practicable.

Hearing when reconciliation fails.

12. Where a judge has acted as conciliator under section 11 (1) (*b*) above but the attempt to effect a reconciliation has failed, the judge shall not, except at the request of the parties to the proceedings, continue to hear the proceedings, or determine the proceedings; and, in the absence of such a request, the proceedings shall be dealt with by another judge.

Statements, etc., made in course of attempt to effect reconciliation.

13. Evidence of anything said or of any admission made in the course of an endeavour to effect a reconciliation under this Part of this Decree shall not be admissible in any court (whether exercising federal jurisdiction or not) or in proceedings before a person authorised by any enactment, federal or state, or by consent of parties, to hear, receive and examine evidence.

Marriage conciliator to take oath of secrecy.

14. A marriage conciliator shall, before entering upon the performance of his functions as such a conciliator, make and subscribe, before a person authorised in Nigeria to take affidavits, an oath or affirmation of secrecy in accordance with the form in Schedule 2 to this Decree.

Dissolution of marriage

Grounds for dissolution of marriage.

15.—(1) A petition under this Decree by a party to a marriage for a decree of dissolution of the marriage may be presented to the court by either party to the marriage upon the ground that the marriage has broken down irretrievably.

(2) The court hearing a petition for a decree of dissolution of a marriage shall hold the marriage to have broken down irretrievably if, but only if, the petitioner satisfies the court of one or more of the following facts—

(*a*) that the respondent has wilfully and persistently refused to consummate the marriage;

(*b*) that since the marriage the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

(*c*) that since the marriage the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

(*d*) that the respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition;

(*e*) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent does not object to a decree being granted;

(*f*) that the parties to the marriage have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition;

(*g*) that the other party to the marriage has, for a period of not less than one year, failed to comply with a decree of restitution of conjugal rights made under this Decree;

(*h*) that the other party to the marriage has been absent from the petitioner for such time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead.

(3) For the purposes of subsection (2)(e) and (f) above the parties to a marriage shall be treated as living apart unless they are living with each other in the same household.

Provisions supplementary to s. 15.

16.—(1) Without prejudice to the generality of section 15 (2) (*c*) of this Decree, the court hearing a petition for a decree of dissolution of marriage shall hold that the petitioner has satisfied the court of the fact mentioned in the said section (15) (2) (*c*) if the petitioner satisfies the court that—

(*a*) since the marriage, the respondent has committed rape, sodomy, or bestiality ; or

(*b*) since the marriage, the respondent has, for a period of not less than two years—

(*i*) been a habitual drunkard ; **or**

(*ii*) habitually been intoxicated by reason of taking or using to excess any sedative, narcotic or stimulating drug or preparation,

or has, for a part or parts of such a period, been a habitual drunkard and has, for the other part or parts of the period, habitually been so intoxicated ; **or**

(*c*) since the marriage, the respondent has within a period not exceeding five years—

(*i*) suffered frequent convictions for crime in respect of which the respondent has been sentenced in the aggregate to imprisonment for not less than three years ; and

(*ii*) habitually left the petitioner without reasonable means of support ; **or**

(*d*) since the marriage, the respondent has been in prison for a period of not less than three years after conviction for an offence punishable by death or imprisonment for life or for a period of five years or more, and is still in prison at the date of the petition ; or

(*e*) since the marriage and within a period of one year immediately preceding the date of the petition, the respondent has been convicted of—

(*i*) having attempted to murder or unlawfully to kill the petitioner ; or

(*ii*) having committed an offence involving the intentional infliction of grievous harm or grievous hurt on the petitioner or the intent to inflict grievous harm or grievous hurt on the petitioner ; or

(*f*) the respondent has habitually and wilfully failed, throughout the period of two years immediately preceding the date of the petition, to pay maintenance for the petitioner—

(*i*) ordered to be paid under an order of, or an order registered in, a court in the Federation ; or

(*ii*) agreed to be paid under an agreement between the parties to the marriage providing for their separation ; or

(*g*) the respondent—

(*i*) is, at the date of the petition, of unsound mind and unlikely to recover ; and

(*ii*) since the marriage and within the period of six years immediately preceding the date of the petition, has been confined for a period of, or for periods aggregating, not less than five years in an institution where persons may be confined for unsoundness of mind in accordance with law, or in more than one such institution.

(2) Where a petition is based on the fact mentioned in section 15 (2) (*h*) of this Decree—

(*a*) proof that, for a period of seven years immediately preceding the date of the petition, the other party to the marriage was continually absent from the petitioner and that the petitioner has no reason to believe that

the other party was alive at any time within that period is sufficient to establish the fact in question, unless it is shown that the other party to the marriage was alive at a time within that period ; and

(*b*) a decree made pursuant to the petition shall be in the form of a decree of dissolution of marriage by reason of presumption of death.

Additional provisions to encourage reconciliation.

17.—(1) Where the petitioner alleges that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him but the parties to the marriage have lived with each other for a period or periods after the date of the occurrence of the final incident relied on by the petitioner and held by the court to support his allegation, that fact shall be disregarded in determining for the purposes of section 15 (2) (*c*) of this Decree whether the petitioner cannot reasonably be expected to live with the respondent if the length of that period or of those periods together was six months or less.

(2) In considering for the purposes of section 15 (2) of this Decree whether the period for which the respondent has deserted the petitioner or the period for which the parties to a marriage have lived apart has been continuous, no account shall be taken of any one period (not exceeding six months) or of any two or more periods (not exceeding six months in all) during which the parties resumed living with each other, but no period during which the parties lived with each other shall count as part of the period of desertion or of the period for which the parties to the marriage lived apart, as the case may be.

(3) References in this section to the parties to a marriage living with each other shall be construed as references to their living with each other in the same household.

Constructive desertion.

18. A married person whose conduct constitutes just cause or excuse for the other party to the marriage to live separately or apart, and occasions that other party to live separately or apart, shall be deemed to have wilfully deserted that other party without just cause or excuse, notwithstanding that that person may not in fact have intended the conduct to occasion that other party to live separately or apart.

Refusal to resume cohabitation.

19.—(1) Where husband and wife are parties to an agreement for separation, whether oral, in writing or constituted by conduct, the refusal by one of them, without reasonable justification, to comply with the other's bona fide request to resume cohabitation shall constitute, as from the date of the refusal, wilful desertion without just cause or excuse on the part of the party so refusing.

(2) For the purposes of this section, "reasonable justification" means justification that is reasonable in all the circumstances, including the conduct of the other party to the marriage since the marriage, whether that conduct took place before or after the agreement for separation.

Desertion continuing after insanity.

20. Where a party to a marriage has been wilfully deserted by the other party, the desertion shall not be deemed to have been terminated by reason only that the deserting party has become incapable of forming or having an intention to continue the desertion, if it appears to the court that the desertion would probably have continued if the deserting party had not become so incapable.

Restriction on finding of non-consummation.

21. The court shall not find that a respondent has wilfully and persistently refused to consummate the marriage unless the court is satisfied that, as at the commencement of the hearing of the petition, the marriage had not been consummated.

Aggregation of concurrent sentences in reckoning imprisonment.

22. Where—

(*a*) a person has been sentenced to imprisonment in respect of each of two or more crimes that, in the opinion of the court hearing the petition, arose substantially out of the same acts or omissions ; and

(*b*) the sentences were ordered to be served, in whole or in part, concurrently,

then, in reckoning for the purposes of section 16 (1) (*c*) of this Decree the period for which that person has been sentenced in the aggregate, any period during which two or more of those sentences were to be served concurrently shall be taken into account once only.

Restriction on finding of non-maintenance.

23. A finding in accordance with section 16 (1) (*f*) of this Decree shall not be made unless the court is satisfied that reasonable attempts have been made by the petitioner to enforce the order or agreement under which maintenance was ordered or agreed to be paid.

Restriction on finding of insanity.

24. A finding in accordance with section 16 (1) (*g*) of this Decree shall not be made unless the court is satisfied that, at the commencement of the hearing of the petition, the respondent was still confined in an institution referred to in the said section 16 (1) (*g*) and was unlikely to recover.

Power to refuse to make decree without maintenance, etc. in proper case.

25. On the application of the respondent made in the course of proceedings for a decree of dissolution of marriage, the court may, if it considers it just and proper in the circumstances of the case to make provision for the maintenance of the respondent or other provision for the benefit of the respondent, refuse to make a decree unless and until it is satisfied that the petitioner has made arrangements satisfactory to the court to provide the maintenance or other benefit as aforesaid upon the decree becoming absolute.

Condonation and connivance.

26. Except where section 16 (1) (*g*) of this Decree applies, a decree of dissolution of marriage shall not be made if the petitioner has condoned or connived at the conduct constituting the facts on which the petition is based.

Collusion.

27. A decree of dissolution of marriage shall not be made if the petitioner, in bringing or prosecuting the proceedings, has been guilty of collusion with intent to cause a perversion of justice.

Discretionary bars.

28. The court may, in its discretion, refuse to make a decree of dissolution of marriage if since the marriage—

(*a*) the petitioner has committed adultery that has not been condoned by the respondent or, having been so condoned, has been revived ;

(*b*) the petitioner has wilfully deserted the respondent before the happening of the matters relied upon by the petitioner or, where those matters involve other matters occurring during, or extending over, a period, before the expiration of that period ; or

(*c*) the habits of the petitioner have, or the conduct of the petitioner has, conduced or contributed to the existence of the matters relied upon by the petitioner.

No dissolution where petition for nullity before court.

29. Where both a petition for a decree of nullity of a marriage and a petition for a decree of dissolution of that marriage are before a court, the court shall not make a decree of dissolution of the marriage unless it has dismissed the petition for a decree of nullity of the marriage.

Petition within two years of marriage.

30.—(1) Subject to this section, proceedings for a decree of dissolution of marriage shall not be instituted within two years after the date of the marriage except by leave of the court.

(2) Nothing in this section shall apply to the institution of proceedings based on any of the matters specified in section 15 (2) (*a*) or (*b*) or 16 (1) (*a*) of this Decree, or to the institution of proceedings for a decree of dissolution of marriage by way of cross-proceedings.

(3) The court shall not grant leave under this section to institute proceedings except on the ground that to refuse to grant the leave would impose exceptional hardship on the applicant or that the case is one involving exceptional depravity on the part of the other party to the marriage.

(4) In determining an application for leave to institute proceedings under this section, the court shall have regard to the interest of any children of the marriage, and to the question whether there is any reasonable probability of a reconciliation between the parties before the expiration of the period of two years after the date of the marriage.

(5) Where, at the hearing of proceedings that have been instituted by leave of the court under this section, the court is satisfied that the leave was obtained by misrepresentation or concealment of material facts, the court may—

(*a*) adjourn the hearing for such period as the court thinks fit ; or

(*b*) dismiss the petition on the ground that the leave was so obtained.

(6) Where, in a case to which subsection (5) above applies, there is a cross-petition, if the court adjourns or dismisses the petition under that subsection, it shall also adjourn for the same period, or dismiss, as the case may be, the cross-petition ; but if the court, having regard to the provisions of this section, thinks it proper to hear and determine the cross-petition, it may do so, and in that case it shall also hear and determine the petition.

(7) The dismissal of a petition or a cross-petition under subsection (5) or (6) of this section shall not prejudice any subsequent proceedings on the same, or substantially the same, facts as those constituting the ground on which the dismissed petition or cross-petition was brought.

(8) Nothing in this section shall prevent the institution of proceedings, after the period of two years from the date of the marriage, based upon matters which have occurred within that period.

(9) In this section, a reference to the leave of the court shall be deemed to include a reference to leave granted by a court on appeal.

Claim for damages.

31.—(1) A party to a marriage, whether husband or wife, may, in a petition for a decree of dissolution of the marriage alleging that the other party to the marriage has committed adultery with a person or including that allegation, claim damages from that person on the ground that that person has committed adultery with the other party to the marriage and, subject to this section, the court may award damages accordingly.

(2) The court shall not award damages against a person where the adultery of the respondent with that person has been condoned, whether subsequently revived or not, or if a decree of dissolution of the marriage based on the fact of the adultery of the respondent with that person, or on facts including that fact, is not made.

(3) Damages shall not be awarded under this Decree in respect of an act of adultery committed more than three years before the date of the petition.

(4) The court may direct in what manner the damages awarded shall be paid or applied and may, if it thinks fit, direct that they shall be settled for the benefit of the respondent or the children of the marriage.

Joinder of adulterers, etc.

32.—(1) Where, in a petition for a decree of dissolution of marriage or in an answer to such a petition, a party to the marriage is alleged to have committed adultery with a specified person, whether or not a decree of dissolution of marriage is sought on the basis of that allegation, that person shall, except as provided by rules of court, be made a party to the proceedings.

(2) Where, in a petition for a decree of dissolution of marriage or in an answer to such a petition, a party to the marriage is alleged to have committed rape or sodomy on or with a specified person, whether or not a decree of dissolution of marriage is sought on the basis of that allegation, that person shall, except as provided by rules of court, be served with notice that the allegation has been made and is thereupon entitled to intervene in the proceedings.

(3) Where a person has been made a party to proceedings for a decree of dissolution of marriage in pursuance of subsection (1) above, the court may, on the application of that person, if it is satisfied after the close of the case for the party to the marriage who alleged the adultery that there is not sufficient evidence to establish that that person committed adultery with the other party to the marriage, dismiss that person from the proceedings.

Effect of dissolution of marriage.

33. Where a decree of dissolution of marriage under this Decree has become absolute, a party to the marriage may marry again as if the marriage had been dissolved by death.

Nullity of marriage

Ground for decree of nullity of marriage.

34. Subject to the following provisions of this Part of this Decree, a petition under this Decree for nullity of marriage may be based on the ground that the marriage is void, or on the ground that the marriage is voidable at the suit of the petitioner.

Who may institute proceedings.

35. A decree of nullity of marriage shall not be made upon the petition—

(*a*) of the party suffering from the incapacity to consummate the marriage, on the ground that the marriage is voidable by virtue of section 5 (1) (*a*) of this Decree, unless that party was not aware of the existence of the incapacity at the time of the marriage ;

(*b*) of the party suffering from the disability or the disease, on the ground that the marriage is voidable by virtue of section 5 (1) (*b*) or (*c*) of this Decree ; or

(*c*) of the wife, on the ground that the marriage is voidable by virtue of section 5 (1) (*d*) of this Decree.

Incapacity to consummate marriage.

36.—(1) A decree of nullity of marriage shall not be made on the ground that the marriage is voidable by virtue of section 5 (1) (*a*) of this Decree unless the court is satisfied that the incapacity to consummate the marriage also existed at the time when the hearing of the petition commenced and that—

(*a*) the incapacity is not curable ;

(*b*) the respondent refuses to submit to such medical examination as the court considers necessary for the purpose of determining whether the incapacity is curable ; or

(*c*) the respondent refuses to submit to proper treatment for the purpose of curing the incapacity.

(2) A decree of nullity of marriage shall not be made on the ground that the marriage is voidable by virtue of section 5 (1) (*d*) of this Decree where the court is of opinion that—

(*a*) by reason of—

(*i*) the petitioner's knowledge of the incapacity at the time of the marriage ; or

(*ii*) the conduct of the petitioner since the marriage ; or

(*iii*) the lapse of time ; or

(*b*) for any other reason,

it would, in the particular circumstances of the case, be harsh and oppressive to the respondent, or contrary to the public interest, to make a decree.

Restrictions on certain grounds.

37. A decree of nullity of marriage shall not be made on the ground that the marriage is voidable by virtue of section 5 (1) (*b*), (*c*) or (*d*) of this Decree unless the court is satisfied that—

(*a*) the petitioner was, at the time of the marriage, ignorant of the facts constituting the ground ;

(*b*) the petition was filed not later than twelve months after the date of the marriage ; and

(*c*) marital intercourse has not taken place with the consent of the petitioner since the petitioner discovered the existence of the facts constituting the ground.

Effect of decree of nullity of a voidable marriage.

38.—(1) A decree of nullity under this Decree of a voidable marriage shall annul the marriage from and including the date on which the decree becomes absolute.

(2) Without prejudice to the operation of subsection (1) above in other respects, a decree of nullity under this Decree of a voidable marriage shall not render illegitimate a child of the parties born since, or legitimated during, the marriage.

Judicial separation

Grounds for judicial separation.

39. Subject to this Division, a petition under this Decree by a party to a marriage for a decree of judicial separation may be based on one or more of the facts and matters specified in sections 15 (2) and 16 (1) of this Decree.

Application to judicial separation of sundry sections of this Part.

40. The provisions of sections 18 to 24 and sections 26 to 32 of this Decree shall apply to and in relation to a decree of judicial separation and proceedings for such a decree and, for the purposes of those provisions as so applying, a reference in those provisions to a decree of dissolution of marriage shall be read as a reference to a decree of judicial separation.

Effect of decree of judicial separation.

41. A decree of judicial separation relieves the petitioner from the obligation to cohabit with the other party to the marriage while the decree remains in operation, but, except as provided by this Division, it shall not otherwise affect the marriage or the status, rights and obligations of the parties to the marriage.

Effect on rights to sue, devolution of property, etc.

42.—(1) While a decree of judicial separation is in operation, either party to the marriage may bring proceedings in contract or in tort against the other party.

(2) Where a party to a marriage dies intestate as to any property while a decree of judicial separation is in operation, that property shall devolve as if that party had survived the other party to the marriage.

(3) Where upon, or in consequence of, the making of a decree of judicial separation a husband is ordered to pay maintenance to his wife, and the maintenance is not duly paid, the husband shall be liable for necessaries supplied for the wife's use.

Exercise of joint powers not affected.

43. Nothing in this Division shall prevent a wife, during separation under a decree of judicial separation, from joining in the exercise of any power given to herself and her husband jointly.

Decree of judicial separation not to bar subsequent proceedings for dissolution of marriage.

44.—(1) A decree of judicial separation shall not prevent the institution by either party to the marriage of proceedings for a decree of dissolution of marriage.

(2) Subject to the next succeeding subsection, the court may, in any proceedings for a decree of dissolution of marriage on the same, or substantially the same, facts as those on which a decree of judicial separation has been made, treat the decree of judicial separation as sufficient proof of the facts constituting the ground on which that decree was made.

(3) The court shall not grant a decree of dissolution of marriage without receiving evidence by the petitioner in support of the petition.

Discharge of decree of judicial separation on resumption of cohabitation.

45. Where, after the making of a decree of judicial separation the parties voluntarily resume cohabitation, either party may apply for an order discharging the decree; and the court shall, if both parties consent to the order, or if the court is otherwise satisfied that the parties have voluntarily resumed cohabitation, make an order discharging the decree accordingly.

Application of ss. 41 to 45 to certain decrees.

46. The provisions of sections 41 to 45 of this Decree shall apply to and in relation to a decree of judicial separation made before the commencement of this Decree by a court in Nigeria as well as to such a decree made after the commencement of this Decree.

Restitution of conjugal rights

Ground for decree of restitution of conjugal rights.

47. A petition under this Decree by a party to a marriage for a decree of restitution of conjugal rights may be based on the ground that the parties to the marriage, whether or not they have at any time cohabited, are not cohabiting and that, without just cause or excuse, the party against whom the decree is sought refuses to cohabit with, and render conjugal rights to, the petitioner.

Agreement for separation.

48. An agreement for separation, whether entered into before or after the commencement of this Decree, shall not constitute a defence to proceedings under this Decree for a decree of restitution of conjugal rights.

Sincerity of petitioner.

49. The court shall not make a decree of restitution of conjugal rights unless it is satisfied—

(*a*) that the petitioner sincerely desires conjugal rights to be rendered by the respondent and is willing to render conjugal rights to the respondent; and

(*b*) that a written request for cohabitation, expressed in conciliatory language, was made to the respondent before the institution of the proceedings, or that there are special circumstances which justify the making of the decree notwithstanding that such a request was not made.

Notice as to home.

50. Where the court makes a decree of restitution of conjugal rights on the petition of a husband, the petitioner shall, as soon as practicable after the making of the decree, and at such other times as rules of court so require, give to the respondent notice, in accordance with rules of court, of the provision made by the petitioner, or which the petitioner is willing to make, with respect to a home, for the purpose of enabling the respondent to comply with the decree.

Enforcement of decree.

51. A decree of restitution of conjugal rights shall not be enforceable by attachment.

Jactitation of marriage

Ground for decree of jactitation of marriage, and discretion of court.

52. A petition under this Decree for a decree of jactitation of marriage may be based on the ground that the respondent has falsely boasted and persistently asserted that a marriage has taken place between the respondent and the petitioner; but the making of the decree shall be in the discretion of the court, notwithstanding anything contained in this Decree.

General

Facts, etc. occurring before commencement of Decree or outside Nigeria.

53.—(1) A decree may be made, or refused, under this Part of this Decree by reason of facts and circumstances notwithstanding that those facts and circumstances, or some of them, took place before the commencement of this Decree or outside Nigeria.

(2) For the purposes of this section, the provisions of sections 18, 19 and 20 of this Decree shall be deemed to extend to matters which occurred before the commencement of this Decree.

Institution of proceedings.

54.—(1) Subject to the next succeeding subsection, a matrimonial cause of a kind referred to in paragraph (*a*) or (*b*) of the definition of "matrimonial cause" in section 114 (1) of this Decree shall be instituted by petition.

(2) A respondent may, in the answer to the petition, seek any decree or declaration that the respondent could have sought in a petition.

(3) Proceedings of a kind referred to in paragraph (*c*) of the definition of "matrimonial cause" in section 114 (1) of this Decree that are in relation to proceedings under this Decree for a decree or declaration of a kind referred to in paragraph (*a*) or (*b*) of that definition—

(*a*) may be instituted by the same petition as that by which the proceedings for that decree or declaration are instituted; and

(*b*) except as permitted by the rules or by leave of the court, shall not be instituted in any other manner.

(4) The court shall, so far as is practicable, hear and determine at the same time all proceedings instituted by the one petition.

Duty of court.

55. Save where other provision in that behalf is made by this Decree, the court, upon being satisfied of the existence of any ground in respect of which relief is sought, shall make the appropriate decree.

Decree nisi in first nstanc e.

56. A decree of dissolution of marriage or nullity of a voidable marriage under this Decree shall, in the first instance, be a decree nisi.

Decree absolute where children under sixteen years, etc

57.—(1) Where there are children of the marriage in relation to whom this section applies, the decree nisi shall not become absolute unless the court, by order, has declared—

(*a*) that it is satisfied that proper arrangements in all the circumstances have been made for the welfare and, where appropriate, the advancement and education of those children ; or

(*b*) that there are such special circumstances that the decree nisi should become absolute notwithstanding that the court is not satisfied that such arrangements have been made.

(2) In this section, "children of the marriage in relation to whom this section applies" means—

(*a*) the children of the marriage who are under the age of sixteen years at the date of the decree nisi ; and

(*b*) any children of the marriage in relation to whom the court has, in pursuance of the next succeeding subsection, ordered that this section shall apply.

(3) The court may, in a particular case, if it is of opinion that there are special circumstances which justify its so doing, order that this section shall apply in relation to a child of the marriage who has attained the age of sixteen years at the date of the decree nisi.

When decree becomes absolute.

58.—(1) Subject to this section, where in relation to a decree nisi—

(*a*) section 57 above applies, the decree nisi shall become absolute by force of this section at the expiration of—

(*i*) a period of three months from the making of the decree ; or

(*ii*) a period of twenty-eight days from the making of an order under subsection (1) of that section,

whichever is the later ; and

(*b*) section 57 above does not apply, the decree nisi shall become absolute by force of this section upon the expiration of a period of three months from the making of the decree.

(2) Where a decree nisi has been made in any proceedings, the court of first instance (whether or not it made the decree), or a court in which an appeal has been instituted, may, either before or after it has disposed of the proceedings or appeal, and whether or not a previous order has been made under this subsection—

(*a*) having regard to the possibility of an appeal or further appeal, make an order extending the period at the expiration of which the decree nisi will become absolute ; or

(*b*) if it is satisfied that there are special circumstances which justify its so doing, make an order reducing the period at the expiration of which the decree nisi will become absolute.

(3) Where an appeal is instituted (whether or not it is the first appeal) before a decree nisi has become absolute, then, notwithstanding any order in force under the last preceding subsection at the time of the institution of the appeal, the decree nisi, unless reversed or rescinded, shall become absolute by force of this section—

(*a*) at the expiration of a period of twenty-eight days from the day on which the appeal is determined or discontinued ; or

(*b*) on the day on which, in the particular circumstances, the decree would have become absolute under subsection (1) above if no appeal had been instituted,

whichever is the later.

(4) A decree nisi shall not become absolute by force of this section where either of the parties to the marriage has died.

(5) In this section, "appeal", in relation to a decree nisi, means—

(*a*) an appeal, application for leave to appeal or intervention, against or arising out of—

(*i*) the decree nisi; or

(*ii*) an order under the last preceding section in relation to the proceedings in which the decree nisi was made; or

(*b*) an application under section 60 or 61 of this Decree for rescission of the decree or an appeal or application for leave to appeal arising out of such an application.

Certificate as to decree absolute.

59.—(1) Where a decree nisi becomes absolute, the registrar or other proper officer of the court by which the decree was made shall prepare and file a memorandum of the fact and of the date upon which the decree became absolute.

(2) Where a decree nisi has become absolute, any person shall be entitled, on application to the registrar or other proper officer of the court by which the decree was made and on payment of the appropriate fee, to receive a certificate signed by the registrar or other proper officer that the decree nisi has become absolute; and a certificate given under this subsection shall in all courts and for all purposes be evidence of the matters specified in the certificate.

Rescission of decree nisi where parties are reconciled, etc.

60. Notwithstanding anything contained in this Division, where a decree nisi has been made in proceedings for a decree of dissolution of marriage, the court may, at any time before the decree becomes absolute, upon the application of either of the parties to the marriage, rescind the decree on the ground that the parties to the marriage have become reconciled.

Rescission of decree nisi on ground of miscarriage of justice.

61. Where a decree nisi has been made but has not become absolute, the court by which the decree was made may, on the application of a party to the proceedings, if it is satisfied that there has been a miscarriage of justice by reason of fraud, perjury, suppression of evidence or any other circumstance, rescind the decree and, if it thinks fit, order that the proceedings be reheard.

PART III—INTERVENTION

Intervention by Attorney-General on request from court.

62. In any proceedings under this Decree where the court requests him to do so, the Attorney-General of the Federation may intervene in, and contest or argue any question arising in, the proceedings.

Intervention of Attorney-General in other cases.

63. In proceedings under this Decree for a decree of dissolution or nullity of marriage, judicial separation or restitution of conjugal rights, or in relation to the custody or guardianship of children, where the Attorney-General of the Federation has reason to believe that there are matters relevant to the proceedings that have not been, or may not be, but ought to be, made known to the court, he may, at any time before the proceedings are finally disposed of, intervene in the proceedings.

Delegation by Attorney-General.

64.—(1) The Attorney-General of the Federation may, either generally or in relation to a matter or class of matters and either in relation to the whole of the Federation or to a State, by writing under his hand, delegate all or any of his powers and functions under this Part of this Decree (except this power of delegation) to the person occupying from time to time, while the delegation is in force, the office of Attorney-General of a State ; and a power or function so delegated may be exercised or performed by the delegate in accordance with the instrument of delegation.

(2) A delegation under this section shall be revocable at will and the fact that any power or function has been delegated shall not prevent the exercise of the power or the performance of the function by the Attorney-General of the Federation.

(3) More than one delegation may be in force under this section at the one time in relation to the whole of Nigeria or in relation to the same part of Nigeria ; and a delegation in relation to the whole of Nigeria may be in force at the same time as a delegation in relation to parts of Nigeria.

Intervention by other persons.

65.—(1) In proceedings under this Decree for a decree of dissolution or nullity of marriage, judicial separation or restitution of conjugal rights, where a person applies to the court for leave to intervene in the proceedings and the court is satisfied that that person may be able to prove facts relevant to the proceedings that have not been, or may not be, but ought to be, made known to the court, the court may, at any time before the proceedings are finally disposed of, make an order entitling that person to intervene in the proceedings.

(2) An order under this section may be made upon such conditions as the court thinks fit, including the giving of security for costs.

Rescission of decree nisi in consequence of intervention.

66. Where an intervention takes place under this Part of this Decree after a decree nisi has been made and it is proved that the petitioner has been guilty of collusion with intent to cause a perversion of justice, or that material facts have not been brought before the court, the court may rescind the decree.

When proceedings finally disposed of.

67. Where a decree nisi has been made in any proceedings, for the purpose of this Part of this Decree, the proceedings shall not be taken to have been finally disposed of until the decree nisi has become absolute.

Procedure on intervention.

68. A person intervening under this Part or Part II of this Decree shall be deemed to be a party in the proceedings with all the rights, duties and liabilities of a party.

PART IV—MAINTENANCE, CUSTODY AND SETTLEMENTS

Interpretation of "marriage", etc. in the application of this Part.

69. In this Part of this Decree,—

"marriage" includes a purported marriage that is void, but does not include one entered into according to Muslim rites or other customary law, and "children of the marriage" includes—

(*a*) any child adopted since the marriage by the husband and wife or by either of them with the consent of the other ;

(*b*) any child of the husband and wife born before the marriage, whether legitimated by the marriage or not; and

(*c*) any child of either the husband or wife (including an illegitimate child of either of them and a child adopted by either of them) if, at the relevant time, the child was ordinarily a member of the household of the husband and wife,

so however that a child of the husband and wife (including a child born before the marriage, whether legitimated by the marriage or not) who has been adopted by another person or other persons shall be deemed not to be a child of the marriage;

"relevant time" means in relation to proceedings under this Part of this Decree either—

(*a*) the time immediately preceding the time when the husband and wife ceased to live together or, if they have ceased on more than one occasion to live together, the time immediately preceding the time when they last ceased to live together before the institution of the proceedings; or

(*b*) if the husband and wife were living together at the time when the proceedings were instituted, the time immediately preceding the institution of the proceedings.

Powers of court in maintenance proceedings.

70.—(1) Subject to this section, the court may, in proceedings with respect to the maintenance of a party to a marriage, or of children of the marriage, other than proceedings for an order for maintenance pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances.

(2) Subject to this section and to rules of court, the court may, in proceedings for an order for the maintenance of a party to a marriage, or of children of the marriage, pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances.

(3) The court may make an order for the maintenance of a party notwithstanding that a decree is or has been made against that party in the proceedings to which the proceedings with respect to maintenance are related.

(4) The power of the court to make an order with respect to the maintenance of children of the marriage shall not be exercised for the benefit of a child who has attained the age of twenty-one years unless the court is of opinion that there are special circumstances that justify the making of such an order for the benefit of that child.

Powers of court in custody, etc. proceedings.

71. —(1) In proceedings with respect to the custody, guardianship, welfare, advancement or education of children of a marriage the court shall regard the interests of those children as the paramount consideration; and subject thereto, the court may make such order in respect of those matters as it thinks proper.

(2) The court may adjourn any proceedings within subsection (1) above until a report has been obtained from a welfare officer on such matters relevant to the proceedings as the court considers desirable, and any such report may thereafter be received in evidence.

(3) In proceedings with respect to the custody of children of a marriage, the court may, if it is satisfied that it is desirable to do so, make an order placing the children, or such of them as it thinks fit, in the custody of a person other than a party to the marriage.

(4) Where the court makes an order placing a child of a marriage in the custody of a party to the marriage, or of a person other than a party to the marriage, it may include in the order such provision as it thinks proper for access to the child by the other party to the marriage, or by the parties or a party to the marriage, as the case may be.

Power of court in proceedings with respect to settlement of property.

72.—(1) The court may, in proceedings under this Decree, by order require the parties to the marriage, or either of them, to make, for the benefit of all or any of the parties to, and the children of, the marriage, such a settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case.

(2) The court may, in proceedings under this Decree, make such order as the court considers just and equitable with respect to the application for the benefit of all or any of the parties to, and the children of, the marriage of the whole or part of property dealt with by ante-nuptial or post-nuptial settlements on the parties to the marriage, or either of them.

(3) The power of the court to make orders of the kind referred to in this section shall not be exercised for the benefit of a child who has attained the age of twenty-one years unless the court is of opinion that there are special circumstances that justify the making of such an order for the benefit of that child.

General powers of court.

73.—(1) The court, in exercising its powers under this Part of this Decree, may do any or all of the following, that is to say, it may—

(*a*) order that a lump sum or a weekly, monthly, yearly or other periodic sum be paid;

(*b*) order that a lump sum or a weekly, monthly, yearly or other periodic sum be secured;

(*c*) where a periodic sum is ordered to be paid, order that its payment be wholly or partly secured in such manner as the court directs;

(*d*) order that any necessary deed or instrument be executed, and that the documents of title be produced or such other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;

(*e*) appoint or remove trustees;

(*f*) order that payments be made direct to a party to the marriage, or to a trustee to be appointed or to a public officer or other authority for the benefit of a party to the marriage;

(*g*) order that payment of maintenance in respect of a child be made to such persons or public officer or other authority as the court specifies;

(*h*) make a permanent order, an order pending the disposal of proceedings, or an order for a fixed term or for a life or during joint lives, or until further order;

(*i*) impose terms and conditions;

(*j*) in relation to an order made in respect of a matter referred to in section 70, 71 or 72 of this Decree, whether made by that court or by

another court, and whether made before or after the commencement of this Decree,—

(*i*) discharge the order if the party in whose favour it was made marries again or if there is any other just cause for so doing;

(*ii*) modify the effect of the order or suspend its operation wholly or in part and either until further order or until a fixed time or the happening of some future event;

(*iii*) revive wholly or in part an order suspended under sub-paragraph (*ii*) above; or

(*iv*) subject to subsection (2) below, vary the order so as to increase or decrease any amount ordered to be paid by the order;

(*k*) sanction an agreement for the acceptance of a lump sum or periodic sums or other benefits in lieu of rights under an order made in respect of a matter referred to in section 70, 71 or 72 of this Decree, or any right to seek such an order;

(*l*) make any other order (whether or not of the same nature as those mentioned in the preceding paragraphs of this subsection, and whether or not it is in accordance with the practice under any other enactment or law before the commencement of this Decree) which it thinks it is necessary to make to do justice;

(*m*) include in its decree under another Part of this Decree its order under this Part; and

(*n*) subject to this Decree, make an order under this Part of this Decree at any time before or after the making of a decree under another Part thereof.

(2) The court shall not make an order increasing or decreasing an amount ordered to be paid by an order unless it is satisfied—

(*a*) that, since the order was made or last varied, the circumstances of the parties or either of them, or of any child for whose benefit the order was made, have changed to such an extent as to justify its so doing; or

(*b*) that material facts were withheld from the court that made the order or from a court that varied the order or material evidence previously given before such a court was false.

(3) The court shall not make an order increasing or decreasing—

(*a*) the security for the payment of a periodic sum ordered to be paid; or

(*b*) the amount of a lump sum or periodic sum ordered to be secured,

unless it is satisfied that material facts were withheld from the court that made the order, or from a court that varied the order, or that material evidence given before such a court was false.

Execution of deeds, etc., by order of court.

74.—(1) Where a person who is directed by an order under this Part of this Decree to execute a deed or instrument refuses or neglects to do so, the court may appoint an officer of the court or other person to execute the deed or instrument in his name and to do all acts and things necessary to give validity and operation to the deed or instrument.

(2) The execution of the deed or instrument by the person so appointed shall have the same force and validity as if it had been executed by the person directed by the order to execute it.

(3) Where a deed or instrument is executed pursuant to this section, the court may make such order as it thinks just as to the payment of the costs and expenses of and incidental to the preparation and execution of the deed or instrument.

Power of court to make orders on dismissal of petition.

75.—(1) Save as provided by this section, the court shall not make an order under this Part of this Decree where the petition for the principal relief has been dismissed.

(2) Where—

(*a*) the petition for the principal relief has been dismissed after a hearing on the merits ; and

(*b*) the court is satisfied that—

(*i*) the proceedings for the principal relief were instituted in good faith to obtain that relief ; and

(*ii*) there is no reasonable likelihood of the parties becoming reconciled,

the court may, if it considers that it is desirable to do so, make an order under this Part of this Decree, other than an order under section 72 of this Decree.

(3) The court shall not make an order by virtue of subsection (2) above unless it has heard the proceedings for the order at the same time as, or immediately after, the proceedings for the principal relief.

(4) In this section, "principal relief" means relief of a kind referred to in paragraph (*a*) or (*b*) of the definition of "matrimonial cause" in section 114 (1) of this Decree.

Part V—Appeals

General right of appeal.

76.—(1) Subject to section 77 of this Decree, an appeal shall lie as of right from a decision of the High Court of a State in the exercise of its jurisdiction under this Decree—

(*a*) to the Court of Appeal of the State and thence to the Supreme Court ; or

(*b*) if there is no such Court of Appeal, to the Supreme Court.

(2) In this section "decision" means any decree, order or other determination.

Appeals with leave.

77. An appeal under this Decree—

(*a*) from any order made ex parte ;

(*b*) from any order relating only to costs ;

(*c*) from any order made with the consent of the parties ; or

(*d*) in the case of a party to proceedings for dissolution or nullity of marriage who, having had time and opportunity to appeal from any decree nisi in the proceedings, has not so appealed, from any decree absolute founded upon the decree nisi,

shall lie only with the leave of the court from which, or the court to which, the appeal is sought to be made.

Appeal from court of summary jurisdiction.

78. Subject to section 77 of this Decree, where—

(*a*) a maintenance order is registered in a court of summary jurisdiction under section 91 (1) of this Decree ; and

(*b*) in relation to the maintenance order—

(*i*) that court makes any order or does any other thing by way of enforcement of the maintenance order ; or

(*ii*) that or another court of summary jurisdiction makes an attachment of earnings order under paragraph 4 of Schedule 3 to this Decree,

then, without prejudice to any right of appeal which may exist against the making of the maintenance order, there shall exist in respect of the order made or other thing done by the court such rights of appeal (if any) as would have existed if the order had been made or the other thing done in the exercise of the court's ordinary civil jurisdiction.

Appellate jurisdiction and powers.

79. The court hearing an appeal under this Part—

(*a*) is hereby invested with the necessary jurisdiction ;

(*b*) may confirm, vary or reverse any decree, judgment, order or other determination appealed from, order a re-hearing or make such other order as it considers proper to determine the real issue of the appeal ; and

(*c*) subject to this Part, shall otherwise have the same powers as it has in its ordinary appellate jurisdiction in civil proceedings.

Part VI—Recognition of Decrees

Effect of decrees.

80. Where a decree is made under this Decree it shall have effect in all States of the Federation.

Recognition of other decrees.

81.—(1) A decree of dissolution or nullity of marriage made before the commencement of this Decree by a court in Nigeria or made after the commencement of this Decree by such a court in accordance with the transitional provisions of this Decree shall be recognized as valid in all States of the Federation.

(2) A dissolution or annulment of a marriage effected in accordance with the law of a foreign country shall be recognised as valid in Nigeria where, at the date of the institution of the proceedings that resulted in the dissolution or annulment, the party at whose instance the dissolution or annulment was effected (or, if it was effected at the instance of both parties, either of those parties)—

(*a*) in the case of the dissolution of a marriage or the annulment of a voidable marriage, was domiciled in that foreign country ; or

(*b*) in the case of the annulment of a void marriage, was domiciled or resident in that foreign country.

(3) For the purposes of subsection (2) above—

(*a*) where a dissolution of a marriage was effected in accordance with the law of a foreign country at the instance of a deserted wife who was domiciled in that foreign country either immediately before her marriage or immediately before the desertion, she shall be deemed to have been domiciled in that foreign country at the date of the institution of the proceedings that resulted in the dissolution ; and

(*b*) a wife who, at the date of the institution of the proceedings that resulted in a dissolution or annulment of her marriage in accordance with the law of a foreign country, was resident in that foreign country and had been so resident for a period of three years immediately preceding that date shall be deemed to have been domiciled in that foreign country at that date.

(4) A dissolution or annulment of a marriage effected in accordance with the law of a foreign country, not being a dissolution or annulment to which subsection (2) above applies, shall be recognised as valid in Nigeria if its validity would have been recognised under the law of the foreign country in which, in the case of a dissolution, the parties were domiciled at the date of the dissolution or in which, in the case of an annulment, either party was domiciled at the date of the annulment.

(5) Any dissolution or annulment of a marriage that would be recognised as valid under the rules of private international law but to which none of the preceding provisions of this section applies shall be recognised as valid in Nigeria, and the operation of this subsection shall not be limited by any implication from those provisions.

(6) For the purposes of this section, a court in Nigeria, in considering the validity of a dissolution or annulment effected under the law of a foreign country, may treat as proved any facts found by a court of the foreign country or otherwise established for the purposes of the law of the foreign country.

(7) A dissolution or annulment of a marriage shall not be recognised as valid by virtue of subsection (2) or (4) above where, under the rules of private international law, recognition of its validity would be refused on the ground that a party to the marriage had been denied natural justice or that the dissolution or annulment had been obtained by fraud.

(8) Subsections (2) to (7) above shall apply in relation to dissolutions and annulments effected, whether by decree, legislation or otherwise, before or after the commencement of this Decree.

(9) In this section, "foreign country" means a country, or part of a country, outside the Federation.

PART VII—EVIDENCE

Standard of proof.

82.—(1) For the purposes of this Decree, a matter of fact shall be taken to be proved if it is established to the reasonable satisfaction of the court.

(2) Where a provision of this Decree requires the court to be satisfied of the existence of any ground or fact or as to any other matter, it shall be sufficient if the court is reasonably satisfied of the existence of that ground or fact, or as to that other matter.

Evidence of husbands and wives.

83.—(1) Subject to this Part of this Decree, all parties and the wives and husbands of all parties are competent and compellable witnesses in proceedings under this Decree.

(2) Subject to subsection (3) below, in proceedings under this Decree a husband is competent, but not compellable, to disclose communications made between him and his wife during the marriage, and a wife is competent, but not compellable, to disclose communications made between her and her husband during the marriage.

(3) Where a husband and wife are both parties to proceedings under this Decree each of them is competent and compellable to disclose communications made between them during the marriage.

(4) Subsections (2) and (3) above shall apply to communications made before, as well as to communications made on or after, the commencement of this Decree.

Evidence of non-access.

84. Notwithstanding any rule of law, in proceedings under this Decree either party to a marriage may give evidence proving or tending to prove that the parties to the marriage did not have sexual relations with each other at any particular time, but shall not be compellable to give such evidence if it would show or tend to show that a child born to the wife during the marriage was illegitimate.

Evidence as to adultery.

85.—(1) A witness in proceedings under this Decree who, being a party, voluntarily gives evidence on his own behalf or, whether he is a party or not, is called by a party may be asked, and shall be bound to answer, a question the answer to which may show, or tend to show, adultery by or with the witness, where proof of that adultery would be material to the decision of the case.

(2) Except as provided by subsection (1) above, a witness in proceedings under this Decree (whether a party to the proceedings or not) shall not be liable to be asked, or bound to answer, a question the answer to which may show, or tend to show, that the witness has committed adultery.

Proof of marriage, etc.

86. In proceedings under this Decree the court may receive as evidence of the facts stated in it a document purporting to be either the original or a certified copy of any certificate, entry or record of a birth, death or marriage alleged to have taken place whether in Nigeria or elsewhere.

Evidence of rape, etc.

87.—(1) In any proceedings under this Decree—

(*a*) evidence that a person, being a party to a marriage, was after the marriage convicted, whether in Nigeria or elsewhere, of the crime or offence of rape or any other crime or offence in which sexual intercourse with a person of the opposite sex is an element shall be evidence that the former person committed adultery with the person on whom the rape or other crime or offence was committed ; and

(*b*) evidence that a person, being a party to a marriage, was after the marriage convicted, whether in Nigeria or elsewhere, of the crime or offence of sodomy or bestiality shall be evidence that that person committed sodomy or bestiality.

(2) In proceedings under this Decree a certificate of the conviction of a person for a crime or offence, on a date specified in the certificate, by a court of a State of the Federation, being a certificate purporting to be signed by the registrar or other appropriate officer of that court, shall be evidence of the fact and date of the conviction and, if the certificate shows that a sentence of imprisonment was imposed, of the fact that that sentence was imposed.

PART VIII—ENFORCEMENT OF DECREES

Attachment.

88.—(1) Subject to rules of court, a court having jurisdiction under this Decree may enforce by attachment or other process an order made by it under this Decree for payment of maintenance or costs or in respect of the custody of, or access to, children.

(2) The court shall order the release from custody of a person who has been attached under this section upon being satisfied that that person has complied with the order in respect of which he was attached and may, at any time, if the court is satisfied that it is just and equitable to do so, order the release of such a person notwithstanding that he has not complied with that order.

(3) Where attachment or other process remains unsatisfied for not less than six weeks, the person who has been attached under this section in consequence of his failure to comply with an order for the payment of maintenance or costs shall be deemed to be an insolvent person and may be kept in custody under the attachment for a period not exceeding six months after the expiry of the period of six weeks aforesaid, unless the court otherwise orders.

Enforcement of decrees by other High Courts.

89.—(1) A decree made under this Decree by a court having jurisdiction under this Decree may, in accordance with rules of court, be registered in another court having jurisdiction under this Decree.

(2) A decree registered in a court under this section may, subject to rules of court, be enforced as if it had been made by the court in which it is registered.

(3) A reference in this Part of this Decree to the court by which a decree was made shall be construed as including a reference to a court in which the decree is registered under this section.

Recovery of moneys as judgment debt.

90.—(1) Where a decree made under this Decree orders the payment of money to a person, any moneys payable under the decree may be recovered as a judgment debt in a court of competent jurisdiction.

(2) A decree made under this Decree may be enforced, by leave of the court by which it was made (or in which it is registered) and on such terms and conditions as the court thinks fit, against the estate of a party after that party's death.

Summary enforcement of orders for maintenance.

91.—(1) Where pursuant to this Decree a court has made an order for payment of maintenance, the order may be registered in accordance with rules of court in a court of summary jurisdiction of a State of the Federation, and an order so registered may, subject to rules of court, be enforced in the same manner as if it were an order for maintenance of a deserted wife made by the court of summary jurisdiction.

(2) The several courts of summary jurisdiction of the States of the Federation are hereby authorised to do all things necessary for the purposes of subsection (1) above.

Enforcement of maintenance orders by attachment of earnings.

92. An order under this Decree for the payment of maintenance may be enforced in accordance with Schedule 3 to this Decree and the provisions of that Schedule shall have effect in relation to the enforcement of any such order.

Enforcement by other means.

93. Subject to this Decree, rules of court may make provision for the enforcement of decrees made under this Decree by means other than those specified in the preceding provisions of this Part of this Decree.

Enforcement of existing decrees.

94. A decree made in a matrimonial cause before the commencement of this Decree by a court in Nigeria or by an officer of such a court may be enforced—

(*a*) in the manner in which it could be enforced if this Decree had not been made; or

(*b*) subject to rules of court, in the manner in which a like decree made by that court under this Decree may be enforced.

Power to make rules of court for purposes of this Part.

95. Section 112 of this Decree shall include power to make rules of court for the purposes of this Part and shall apply in relation to any such rules.

PART IX—TRANSITIONAL PROVISIONS

Definitions.

96. In this Part of this Decree,—

"pending proceedings" means proceedings instituted in the High Court of a State before the date of commencement of this Decree but not completed before that date;

"the court", in relation to pending proceedings, means the court in which the proceedings were instituted.

Pending proceedings generally.

97. Pending proceedings constituting a matrimonial cause may be continued and dealt with in accordance with and by virtue of this Part of this Decree and not otherwise.

Continuance of proceedings for dissolution or nullity of marriage, or judicial separation.

98—(1) Except as provided by this Part of this Decree, the law to be applied, and the practice and procedure to be followed, in and in relation to pending proceedings, being proceedings for a decree of dissolution or nullity of marriage or of judicial separation, shall be the same as if this Decree had not been made.

(2) Without prejudice to any power that the court has by virtue of subsection (1) above to amend or permit the amendment of a petition, the court may in any such proceedings, upon application by the petitioner and on such conditions, if any, as the court thinks fit, permit the petitioner to amend the petition so as to include a ground of relief provided by this Decree and not already included in the petition; and where such a ground is so included, then, in relation to that ground, the provisions of this Decree applicable in relation to that ground shall apply as if the proceedings had been instituted under this Decree.

(3) Notwithstanding section 114 (4) of this Decree, a reference in this Decree to the date of the petition or the date of institution of proceedings shall, in relation to a ground of relief included or sought to be included in a petition by virtue of the subsection (2) above, be read as a reference to the date on which the application for leave to amend the petition was instituted.

(4) Where, in pending proceedings for a decree of dissolution of marriage, the facts and circumstances that have been established, whether before or after the commencement of this Decree, by the petitioner in support of a ground included in the petition are such that they would have established a ground or grounds for the same relief under this Decree if this Decree had been in force at the date of the petition and the proceedings had been instituted under this Decree, the bars to relief applicable in relation to the ground included in the petition shall be those that would be applicable in proceedings on the ground that would have been established under this Decree, or, if more than one ground would have been established, such one of those grounds as most nearly corresponds to the ground included in the petition, and no other bars.

(5) In the case of pending proceedings, being proceedings for a decree of nullity of marriage on the ground that the marriage is voidable by reason of the parties being within the prohibited degrees of consanguinity or affinity under the law of a State, a decree of nullity of the marriage shall not be made after the commencement of this Decree if the parties were not at the time of the marriage within one of the degrees of consanguinity or affinity set out in Schedule 1 to this Decree.

(6) A decree of dissolution or nullity of marriage or of judicial separation may be made in pending proceedings either—

(*a*) on any basis of jurisdiction that would have been applicable to the proceedings if this Decree had not been made, or

(*b*) on any basis of jurisdiction applicable to proceedings under Part II of this Decree for the same relief.

(7) A reference in this section to a bar to relief shall be read as a reference to a bar to the granting of the relief sought, whether absolute or in the discretion of the court, other than a bar arising by virtue of section 30 of this Decree.

(8) In this section—

"date of the petition", in relation to a petition, means the date on which the petition was filed in, or issued out of, a court;

"petition" includes a writ of summons, a cross-petition, a counter-petition, a counter-claim and an answer;

"petitioner" includes a plaintiff, a cross-petitioner, a counter-petitioner. a defendant counter-claiming and a respondent seeking relief in an answer.

Application of this Decree to pending proceedings for dissolution or nullity of marriage, or judicial separation.

99.—(1) Subject to section 101 of this Decree, the provisions of sections 11 to 14, 18 to 20 (including in respect of sections 18 to 20 those sections as applying to proceedings for a decree of judicial separation by virtue of section 40), sections 33, 38, 41 to 45 and 53, sections 62 to 95, and sections 103 to 112 of this Decree apply, so far as they are capable of application, to and in relation to pending proceedings, being proceedings for a decree of dissolution or nullity of marriage or judicial separation, as if those proceedings had been instituted under this Decree and any decree made in the proceedings had been made in proceedings so instituted.

(2) Subject to section 101 of this Decree, the provisions of sections 56 to 61 of this Decree shall apply to and in relation to pending proceedings, being proceedings for a decree of dissolution of marriage or nullity of a voidable marriage other than proceedings in which a decree nisi has been pronounced before the commencement of this Decree, as if those pending proceedings had been instituted under this Decree and any decree made in the proceedings had been made in proceedings so instituted.

Continuance of other pending proceedings.

100. Subject to section 101 of this Decree, pending proceedings constituting a matrimonial cause, not being proceedings for a decree of dissolution or nullity of marriage or of judicial separation, shall be deemed to have been instituted and dealt with under this Decree and may be continued and dealt with under this Decree.

Special provisions as to pending appeals or existing rights to appeal.

101.—(1) Notwithstanding section 97 of this Decree, where in any proceedings constituting a matrimonial cause a decree has been made before the commencement of this Decree, the following provisions of this subsection shall have effect as if it had not been made, that is to say—

(*a*) any appeal in respect of that decree may be continued or instituted ;

(*b*) any new trial or rehearing ordered upon the hearing of such an appeal, or upon an appeal heard before the commencement of this Decree, may be had and completed ; and

(*c*) any decree may be made upon any such appeal, new trial or rehearing, and, if a decree so made is a decree nisi, the decree may be made or become absolute.

(2) In this section, "appeal" includes—

(*a*) an application for leave or special leave to appeal ;

(*b*) an application for a new trial or a rehearing ; and

(*c*) an intervention.

Decrees of restitution of conjugal rights under previous law.

102.—(1) Subject to this section, section 15 (2) (*g*) of this Decree shall be deemed to apply in relation to a decree of restitution of conjugal rights made by a court in Nigeria before the commencement of this Decree in like manner as it applies in relation to decrees made under this Decree.

(2) Where there has been, whether before or after the commencement of this Decree, a failure to comply with a decree referred to in subsection (1) above made before the commencement of this Decree and that failure enabled, or would, if this Decree had not been made, have enabled, the party in whose favour the decree of restitution of conjugal rights was made to institute proceedings for dissolution of marriage forthwith upon that failure, proceedings for dissolution of marriage may be instituted by that party under this Decree as if the words "for a period of not less than one year" were omitted from the said section 15 (2) (*g*) and as if section 30 of this Decree had no application to proceedings on the ground specified in that paragraph.

(3) For the purposes of proceedings brought by virtue of this section (other than proceedings under subsection (2) above), the requirements of a decree of restitution of conjugal rights made before the commencement of this Decree shall, notwithstanding that any time limited by law for compliance with those requirements has expired, be deemed to have continued so long as the decree did not, by order of a competent court, cease to have effect.

PART X—MISCELLANEOUS

Hearings to be in open court.

103.—(1) Except to the extent to which rules of court make provision for proceedings or part of proceedings to be heard in chambers, the jurisdiction of a court under this Decree shall, subject to the next succeeding subsection, be exercised in open court.

(2) Where in proceedings under this Decree the court is satisfied that there are special circumstances that make it desirable in the interests of the proper administration of justice that the proceedings or any part of the proceedings should not be heard in open court, the court may order that any persons not being parties to the proceedings or their legal advisers shall be excluded during the hearing of the proceedings or the part of the proceedings, as the case may be.

Proceedings to be heard by judge alone.

104. Proceedings at first instance constituting a matrimonial cause shall be heard and determined by a judge sitting alone as the court.

Transactions intended to defeat claims.

105.—(1) In proceedings under this Decree, the court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest, of, a party, if it is made or proposed to be made to defeat an existing or anticipated order in those proceedings for costs, damages, maintenance or the making or variation of a settlement.

(2) The court may order that any money or real or personal property dealt with by any such instrument or disposition may be taken in execution or charged with the payment of such sums for costs, damages or maintenance as the court directs, or that the proceeds of a sale shall be paid into court to abide its order.

(3) The court shall have regard to the interests, and shall make any order proper for the protection, of a bona fide purchaser or other person interested.

(4) A party or a person acting in collusion with a party may be ordered to pay the costs of any other party, or of a bona fide purchaser or other person interested, of and incidental to any such instrument or disposition and the setting aside or restraining of the instrument or disposition.

(5) In this section, "disposition" includes a sale and a gift.

Service of process.

106. Service of process of a court under this Decree may be effected in or outside the Federation in accordance with rules of court, so however that the court, where it thinks it necessary or expedient to do so, may dispense with service of process.

Position of clergy as to re-marriage.

107. A minister of religion shall not be bound to solemnize the marriage of a person whose former marriage has been dissolved, whether in Nigeria or elsewhere, otherwise than by death.

Restriction on publication of evidence.

108.—(1) Except as provided by this section, a person shall not in relation to any proceedings under this Decree print or publish, or cause to be printed or published, any account of evidence in the proceedings, or any other account or particulars of the proceedings, other than—

(*a*) the names, addresses and occupations of the parties and witnesses, and the name or names of the member or members of the court and of the legal advisers of the parties;

(*b*) a concise statement of the nature and grounds of the proceedings and of the charges, defences and counter-charges in support of which evidence has been given;

(*c*) submissions on any points of law arising in the course of the proceedings, and the decision of the court on those points; or

(*d*) the judgement of the court and observations made by the court in giving judgement.

(2) The court may, if it thinks fit in any particular proceedings, order that none of the matters referred to in subsection (1) (*a*) to (*d*) above shall be printed or published, or that any matter or part of a matter so referred to shall not be printed or published.

(3) Any person who contravenes subsection (1) above, or prints or publishes, or causes to be printed or published, any matter, or part of a matter, in contravention of an order of a court under subsection (2) above shall be guilty of an offence punishable on conviction—

(*a*) in the case of a first offence (or a second or subsequent offence if prosecuted summarily) by a fine not exceeding five hundred pounds or imprisonment for a term not exceeding six months; and

(*b*) in the case of a second or subsequent offence, being an offence prosecuted otherwise than in a summary manner, by a fine not exceeding one thousand pounds or imprisonment for a term not exceeding one year.

(4) Proceedings for an offence against this section shall not be commenced except by, or with the written consent of, the Attorney-General of the Federation.

(5) The preceding provisions of this section shall not apply to or in relation to—

(*a*) the printing of any pleading, transcript of evidence or other document for use in connection with proceedings in any court or the communication of any such document to persons concerned in the proceedings ;

(*b*) the printing or publishing of a notice or report in pursuance of the direction of a court ;

(*c*) the printing or publishing of any publication bona fide intended primarily for the use of members of the legal or medical profession, being—

(*i*) a separate volume or part of a series of law reports ; or

(*ii*) any other publication of a technical character ; or

(*d*) the printing or publishing of a photograph of any person, not being a photograph forming part of the evidence in proceedings under this Decree.

(6) In this section, "court" includes an officer of a court investigating a matter in accordance with rules of court and "judgement of the court" includes a report made to a court by such an officer.

Injunctions.

109. A court exercising jurisdiction under this Decree may grant an injunction, by interlocutory order or otherwise (including an injunction in aid of the enforcement of a decree), in any case in which it appears to the court to be just or convenient to do so and either unconditionally or upon such terms and conditions as the court thinks just.

Costs.

110. In proceedings under this Decree the court may, subject to rules of court, make such order as to costs and security for costs, whether by way of interlocutory order or otherwise, as the court thinks just.

Frivolous or vexatious proceedings

111.—(1) The court may at any stage of proceedings under this Decree, if it is satisfied that the proceedings are frivolous or vexatious, dismiss the proceedings.

(2) The court may at any stage of proceedings under this Decree, if it is satisfied that the allegations made in respect of a party to the proceedings are frivolous or vexatious, order that that party be dismissed from the proceedings.

Rules of court.

112.—(1) The Chief Justice of Nigeria after consultation with the Chief Justices of the States and the Presidents of any Courts of Appeal therein may make rules for or in relation to the practice and procedure of the courts (including courts of summary jurisdiction) having jurisdiction under this Decree, or any of them, and without prejudice to the generality hereof, the rules may—

(*a*) prescribe matters relating to the costs of proceedings and the assessment or taxation of those costs ;

(*b*) prescribe the court fees to be charged in respect of proceedings under this Decree or in relation to declarations, affidavits, instruments, documents, searches or extracts ;

(*c*) authorise a court to refer to an officer of the court for investigation, report and recommendation claims or applications for or relating to the custody of children or maintenance or any other matter before the court;

(*d*) authorise an officer making an investigation referred to in paragraph (*c*) above to take evidence on oath or affirmation and to obtain and receive in evidence a report from a welfare officer, and provide for the summoning of witnesses before an officer making such an investigation for the purpose of giving evidence or producing books and documents;

(*e*) regulate the procedure of a court upon receiving a report of an officer who has made an investigation referred to in paragraph (*c*) above;

(*f*) authorise an officer of a court to perform and exercise on behalf of the court or otherwise, in relation to proceedings under this Decree, functions and powers not involving the exercise of the judicial power of the Federation or of a State and enable the court to review the decision of that officer in relation to the performance or exercise of any function or power;

(*g*) provide for proceedings in forma pauperis and the remission of court fees in the case of persons authorised to proceed in forma pauperis; and

(*h*) prescribe matters incidental to the matters specified in the preceding paragraphs of this subsection.

(2) Subject to subsection (3) below, the power of the appropriate authority under the law of a State to make rules of court in relation to the practice and procedure of courts of summary jurisdiction, the High Court or the Court of Appeal of the State shall extend to the making for that State of rules of court for any matter in respect of which rules may be made under subsection (1) above.

(3) Rules made under subsection (2) above shall be subject to rules made under subsection (1) above; and, if there is any inconsistency between rules made under those subsections, the rules made under subsection (1) above shall prevail and the rules made under subsection (2) above shall be void to the extent of the inconsistency.

(4) Notwithstanding section 8 or any other provision of this Decree, the rules of court in force immediately before the commencement of this Decree in respect of divorce and matrimonial causes shall continue in force with necessary modifications until they are expressly revoked by rules of court made under subsection (1) above, which said subsection shall be deemed to include power to make such a revocation.

Savings for sundry domestic and foreign decrees, etc.

113. For the avoidance of doubt it is declared—

(*a*) that a decree, judgement, order or sentence of the High Court of a State of the Federation given, made or pronounced before the commencement of this Decree in the exercise of jurisdiction invested or conferred upon it in respect of matrimonial causes and in force immediately before the commencement of this Decree shall, notwithstanding the repeal of any legislation under which the decree, judgement, order or sentence was given, made or pronounced, continue to have effect throughout the Federation; and

(*b*) that the validity of a decree, judgement, order or sentence given, made or pronounced by a court of competent jurisdiction in the Commonwealth (elsewhere than Nigeria) before the commencement of this Decree by virtue of any enactment passed or made in respect of a marriage entered into during the war of 1939-1945 and in force immediately before the commencement of this Decree shall, if reciprocal arrangements are made

for the recognition of the like decrees, judgements, orders or sentences given, made or pronounced in Nigeria in respect of any such marriages, be accorded in Nigeria the same recognition as if they were decrees, judgements, orders or sentences given, made or pronounced by a court of competent jurisdiction in Nigeria.

Interpretation.

114.—(1) In this Decree unless the contrary intention appears—

"adopted", in relation to a child, means adopted under the law of any place (whether in or out of Nigeria) relating to the adoption of children ;

"appeal" includes an application for a rehearing ;

"court" or "the court", in relation to any proceedings, means the court exercising jurisdiction in those proceedings by virtue of this Decree ;

"court of summary jurisdiction" means a magistrate's court or District Court ;

"crime" means an offence punishable by imprisonment ;

"cross-petition" includes an answer in which the respondent to a petition seeks a decree or declaration of a kind referred to in paragraph (*a*) or (*b*) of the definition of "matrimonial cause" in this subsection ;

"decree" (not being a Decree having effect as an enactment made by the Federal Military Government) includes a decree absolute or decree nisi, a judgement, and any order dismissing a petition or application or refusing to make a decree or order ;

"marriage conciliator" means a person authorised to endeavour to effect marital reconciliations or a person nominated by a judge, in pursuance of section 11 of this Decree, to endeavour to effect a reconciliation ;

"matrimonial cause" means—

(*a*) proceedings for a decree of—

(*i*) dissolution of marriage ;

(*ii*) nullity of marriage ;

(*iii*) judicial separation ;

(*iv*) restitution of conjugal rights ; or

(*v*) jactitation of marriage ;

(*b*) proceedings for a declaration of the validity of the dissolution or annulment of a marriage by decree or otherwise or of a decree of judicial separation, or for a declaration of the continued operation of a decree of judicial separation, or for an order discharging a decree of judicial separation ;

(*c*) proceedings with respect to the maintenance of a party to the proceedings, settlements, damages in respect of adultery, the custody or guardianship of infant children of the marriage or the maintenance, welfare, advancement or education of children of the marriage, being proceedings in relation to concurrent, pending or completed proceedings of a kind referred to in paragraph (*a*) or (*b*) above, including proceedings of such a kind pending at, or completed before, the commencement of this Decree ;

(*d*) any other proceedings (including proceedings with respect to the enforcement of a decree, the service of process or costs) in relation to concurrent, pending or completed proceedings of a kind referred to in paragraph (*a*), (*b*) or (*c*) above, including proceedings of such a kind pending at, or completed before, the commencement of this Decree ; or

(*e*) proceedings seeking leave to institute proceedings for a decree of dissolution of marriage or of judicial separation, or proceedings in relation to proceedings seeking such leave;

"petition" includes a cross-petition;

"petitioner" includes a cross-petitioner;

"proceedings" includes cross-proceedings;

"respondent" includes a petitioner against whom there is a cross-petition;

"State" means a State of the Federation;

"welfare officer" means a person authorised by the Attorney-General of the Federation by instrument in writing to perform duties as a welfare officer for the purposes of this Decree, being—

(*a*) a person who is permanently or temporarily employed in the public service of the Federation; or

(*b*) a person who is permanently or temporarily employed in the public service of a State and whose services have been made available for the purposes of this Decree in pursuance of an arrangement between the Federation and the State; or

(*c*) a person nominated by an organisation undertaking child welfare activities.

(2) A reference in this Decree to a court having jurisdiction under this Decree or exercising jurisdiction under this Decree shall be deemed not to include a reference to a court having jurisdiction under this Decree or exercising jurisdiction under this Decree by virtue only of section 91 or 92 of this Decree or Schedule 3 to this Decree.

(3) In this Decree "this Division" occurring in a group of sections under an italicised cross-heading means that group of sections.

(4) For the purposes of this Decree, the date of a petition shall be taken to be the date on which the petition was filed in a court having jurisdiction under this Decree.

(5) For the purposes of this Decree, a person shall be deemed to have been convicted of an offence if he has been convicted of that offence otherwise than by a court in its exercise of summary jurisdiction or on appeal from such a court.

(6) Nothing in this Decree shall have effect in relation to a marriage which is not a monogamous marriage or which is entered into in accordance with Muslim rites or with any customary law in force in Nigeria.

Amendments and repeals. Cap. 80.

115.—(1) In section 33 of the Marriage Act—

(*a*) the marginal note "Marriage with deceased wife's sister or niece lawful." shall be deleted and the marginal note "Invalid marriages." shall be applied to the whole section; and

(*b*) in subsection (1), the words "A marriage may be lawfully celebrated under this Act between a man and the sister or niece of his deceased wife, but, save as aforesaid," and the words "which, if celebrated in England, would be null and void on the ground of kindred or affinity, or" shall be deleted.

Cap. 177.

(2) In the State Courts (Federal Jurisdiction) Act (formerly cited as the Regional Courts (Federal Jurisdiction) Act)—

(*a*) the words "and, to the extent that", and all the following words, in the Long Title;

(*b*) the words "AND WHEREAS", and all the following words, in the Preamble;

(*c*) the definitions of "marriage" and "matrimonial cause" in section 2; and

(*d*) section 4, section 5 (without prejudice to anything saved thereby or lawfully done thereunder) and section 6,

are hereby repealed.

Cap. 62.

(3) For section 147 of the Evidence Act there shall be substituted the following section—

"Presumption of legitimacy.

147. Without prejudice to section 84 of the Matrimonial Causes Decree 1970, where a person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, the court shall presume that the person in question is the legitimate son of that man."

(4) For the avoidance of doubt it is hereby declared that, if there is any inconsistency between this Decree and any other law, this Decree shall prevail and that other law shall be void to the extent of the inconsistency.

Citation, extent and commencement.

116.—(1) This Decree may be cited as the Matrimonial Causes Decree 1970 and shall apply throughout the Federation.

(2) This Decree shall come into operation on a day to be appointed by the Federal Commissioner for Justice by order published in the Federal Gazette.

SCHEDULES

SCHEDULE I — Section 3

PROHIBITED DEGREES OF CONSANGUINITY AND AFFINITY

Consanguinity	*Affinity*
Marriage of a man is prohibited if the woman is, or has been, his—	
Ancestress	Wife's mother
Descendant	Wife's grandmother
Sister	Wife's daughter
Father's sister	Wife's son's daughter
Mother's sister	Wife's daughter's daughter
Brother's daughter	Father's wife
Sister's daughter	Grandfather's wife
	Son's wife
	Son's son's wife
	Daughter's son's wife
Marriage of a woman is prohibited if the man is, or has been, her—	
Ancestor	Husband's father
Descendant	Husband's grandfather
Brother	Husband's son
Father's brother	Husband's son's son
Mother's brother	Husband's daughter's son
Brother's son	Mother's husband
Sister's son	Grandmother's husband
	Daughter's husband
	Son's daughter's husband
	Daughter's daughter's husband

For the purposes of this Schedule, it is immaterial whether the relationship is of the whole blood or half-blood, or whether it is traced through, or to, any person of illegitimate birth.

SCHEDULE 2 Section 14

OATH OR AFFIRMATION BY MARRIAGE CONCILIATOR

I, A.B., do swear by Almighty God (*or* solemnly and sincerely affirm and declare) that I will not disclose to any person any communication or admission made to me in my capacity as a marriage conciliator except in so far as it is necessary for me to do so for the proper discharge of my function as a marriage conciliator.

SCHEDULE 3 Section 92

ENFORCEMENT OF ORDERS FOR MAINTENANCE

1. In this Schedule, unless the contrary intention appears—

"attachment of earnings order" means an order under paragraph 4 below;

"defendant", in relation to a maintenance order, means the person liable make payments under the order ;

"earnings", in relation to a defendant, means any sums payable to the defendant—

(*a*) by way of wages or salary (including any fees, bonus, commission, overtime pay or other emoluments payable in addition to wages or salary) ; or

(*b*) by way of pension, including—

(*i*) an annuity in respect of past services, whether or not the services were rendered to the person paying the annuity ; and

(*ii*) periodical payments by way of compensation for the loss, abolition or relinquishment, or any diminution in the emoluments, of any office or employment,

but not including any pension payable to the defendant in respect of injury, disablement or disability ;

"employer", in relation to a defendant, means a person (including the Federal Republic or a State thereof as the case may be) by whom, as a principal and not as a servant or agent, earnings are payable or are likely to become payable to the defendant ;

"maintenance order" means an order under this Decree for the payment of maintenance, and includes such an order that has been discharged if any arrears are recoverable under the order ;

"net earnings", in relation to a pay-day, means the amount of the earnings becoming payable on that pay-day, less any sum deducted from those earnings under any law relating to income tax ;

"normal deduction", in relation to an attachment of earnings order and in relation to a pay-day, means an amount representing a payment at the normal deduction rate specified in the order in respect of the period between that pay-day and either the last preceding pay-day or, where there is no last preceding pay-day, the date on which the employer became, or last became, the defendant's employer ;

"pay-day" means an occasion on which earnings to which an attachment of earnings order relates become payable ;

"protected earnings", in relation to an attachment of earnings order and in relation to a pay-day, means the amount representing a payment at the protected earnings rate specified in the order in respect of the period between that pay-day and either the last preceding pay-day or, where there is no last preceding pay-day, the date on which the employer became, or last became, the defendant's employer.

2. In this Schedule—

(*a*) a reference to a person entitled to receive payments under a maintenance order is a reference to a person entitled to receive payments under the maintenance order either directly or through another person or for transmission to another person ;

(*b*) a reference to proceedings relating to an order includes a reference to proceedings in which the order may be made ; and

(*c*) a reference to costs incurred in proceedings relating to a maintenance order shall be read, in the case of a maintenance order made by the High Court of a State, as a reference to such costs as are included in an order for costs relating solely to that maintenance order.

3. Subject to this Schedule, a person entitled to receive payments under a maintenance order may apply to—

(*a*) the court that made the order ; or

(*b*) the court in which the order is for the time being registered under section 89 or 91 of this Decree,

for an attachment of earnings order.

4. If the court is satisfied that the defendant is a person to whom earnings are payable or are likely to become payable and—

(*a*) that, at the time when the application was made, there was due under the maintenance order and unpaid an amount equal to not less than—

(*i*) four payments in the case of an order for weekly payments ; or

(*ii*) two payments in any other case ; or

(*b*) that the defendant has wilfully and persistently failed to comply with the requirements of the order,

the court may in its discretion by an order require a person who appears to the court to be the defendant's employer in respect of those earnings or a part of those earnings to make out of those earnings or that part of those earnings payments in accordance with paragraph 11 below.

5. The court shall not make an attachment of earnings order if it appears to the court, in a case to which paragraph 4(*a*) above applies, that the failure of the defendant to make payments under the maintenance order was not due to his wilful refusal or culpable neglect.

6. An attachment of earnings order shall specify the normal deduction rate, that is to say, the rate at which the court considers it to be reasonable that the earnings to which the order relates should be applied in satisfying the requirements of the maintenance order but not exceeding the rate that appears to the court to be necessary for the purpose of—

(*a*) securing payment of the sums from time to time falling due under the maintenance order ; and

(*b*) securing payment within a reasonable time of any sums already due and unpaid under the maintenance order and any costs incurred in proceedings relating to the maintenance order that are payable by the defendant.

7. An attachment of earnings order shall also specify the protected earnings rate, that is to say, the rate below which, having regard to the resources and needs of the defendant and of any person for whom he must or reasonably may provide, the court considers it to be reasonable that the net earnings of the defendant should not be reduced by a payment under the order.

8. An attachment of earnings order shall provide that payments under the order are to be made to an officer of the court specified in the order.

9. An attachment of earnings order shall contain such particulars as the court thinks proper for the purpose of enabling the person to whom the order is directed to identify the defendant.

10. An attachment of earnings order does not come into force until the expiration of seven days after the day on which a copy of the order is served on the person to whom the order is directed.

11. An employer to whom an attachment of earnings order is directed, being an attachment of earnings order that is in force, shall in respect of each pay-day, if the net earnings of the defendant exceed the sum of—

(*a*) the protected earnings of the defendant ; and

(*b*) so much of any amount by which the net earnings that became payable on any previous pay-day were less than the protected earnings for the purposes of that pay-day as has not been made good on any other previous pay-day,

pay, so far as that excess permits, to the officer specified for the purpose in the order both the normal deduction and so much of the normal deduction for the purposes of any previous pay-day as was not paid on that pay-day and has not been paid on any other previous pay-day.

12. A payment made by the employer under the last preceding paragraph is a valid discharge to him as against the defendant to the extent of the amount paid.

13. Where proceedings for attachment are brought in a court under section 88 of this Decree, or where proceedings are taken in a court of summary jurisdiction to enforce an order registered in that court under section 91 of this Decree, the court may, instead of making any other order, make an attachment of earnings order.

14. Where an attachment of earnings order has been made, no writ, order or warrant of commitment or attachment shall be issued or made in proceedings for the enforcement of the maintenance order that were begun before the making of the attachment of earnings order.

15. The court by which an attachment of earnings order has been made may in its discretion, on the application of the defendant or a person entitled to receive payments under the maintenance order, make an order discharging or varying the attachment of earnings order.

16. An order varying an attachment of earnings order shall not come into force until the expiration of seven days after the date on which the order is served on the person to whom the attachment of earnings order is directed.

17. An attachment of earnings order ceases to have effect—

(*a*) upon the issuing or making of a writ, order or warrant of commitment or attachment for the enforcement of the maintenance order in relation to which the attachment of earnings order applies ; or

(*b*) subject to the next succeeding paragraph, upon the discharge or variation of that maintenance order.

18. Where it appears to the court discharging a maintenance order that arrears under the order will remain to be recovered under the order, the court may in its discretion direct that the attachment of earnings order shall not cease to have effect until those arrears have been paid.

19. Where an attachment of earnings order ceases to have effect, the proper officer of the court by which the order was made shall forthwith give notice accordingly to the person to whom the order was directed.

20. Where an attachment of earnings order ceases to have effect or is discharged, the person to whom the attachment of earnings order is directed does not incur any liability in consequence of his treating the order as still in force at any time before the expiration of seven days after the date on which the notice required by the last preceding paragraph or a copy of the discharging order, as the case may be, is served on him.

21. A person to whom an attachment of earnings order is directed shall, notwithstanding anything in any other law, but subject to this Schedule, comply with the order or, if the order is varied, with the order as varied.

22. Where, on any occasion on which earnings become payable to a defendant there are in force two or more attachment of earnings orders in relation to those earnings, the person to whom the orders are directed—

(*a*) shall comply with those orders according to the respective dates on which they came into force and shall disregard any order until an earlier order has been complied with ; and

(*b*) shall comply with any order as if the earnings to which the order relates were the residue of the defendant's earnings after the making of any payment under any earlier order.

23. A person who makes a payment in compliance with an attachment of earnings order shall give to the defendant a notice specifying particulars of the payment.

24. A person to whom an attachment of earnings order is directed who, at the time when a copy of the order is served on him or at any time after that time, has not on any occasion during the period of four weeks immediately preceding that time been the defendant's employer shall forthwith give notice in writing accordingly to the proper officer of the court that made the order.

25. Where proceedings relating to an attachment of earnings order are brought in any court, the court may, either before or after the hearing—

(*a*) order the defendant to furnish to the court, within a specified period, a statement signed by the defendant specifying—

(*i*) the name and address of his employer or, if he has more employers than one, of each of his employers ;

(*ii*) particulars as to the defendant's earnings ; and

(*iii*) such particulars as are necessary to enable the defendant to be identified by any of his employers ; and

(*b*) order any person who appears to the court to be an employer of the defendant to give to the court within a specified period a statement signed by him or on his behalf containing such particulars as are specified in the order of all earnings of the defendant that became payable by that person during a specified period.

26. A document purporting to be a statement referred to in the last preceding paragraph shall, in any proceedings relating to an attachment of earnings order, be received in evidence and shall, unless the contrary is shown, be presumed without further proof to be such a statement.

27. The court by which an attachment of earnings order has been made shall, on the application of the person to whom the order is directed or of the defendant or of the person in whose favour the order was made, determine whether payments to the defendant of a particular class or description specified in the application are earnings for the purposes of that order.

28.—(1) A person to whom an attachment of earnings order is directed who makes an application under paragraph 27 above shall not incur any liability for failing to comply with the order with respect to any payments of the class or description specified in the application that are made by him to the defendant while the application, or any appeal from a determination made on the application, is pending.

(2) The foregoing sub-paragraph shall not apply in respect of any payment made after the application has been withdrawn or any appeal from a determination made on the application has been abandoned.

29. The officer to whom an employer pays any sum in pursuance of an attachment of earnings order shall pay that sum to such person entitled to receive payments under the maintenance order as is specified by the attachment of earnings order.

30. Any sum received by virtue of an attachment of earnings order by the person entitled to receive it shall be deemed to be a payment made by the defendant to that person, so as to discharge first any sum due and unpaid under the maintenance order (a sum due at an earlier date being discharged before a sum due at a later date) and secondly any costs incurred in proceedings relating to the maintenance order that were payable by the defendant when the attachment of earnings order was made or last varied.

31. On any occasion on which an employer makes a payment under this Schedule in respect of a defendant, the employer may retain for his own use out of any balance of the defendant's earnings remaining after the making of that payment the sum of sixpence or, if on that occasion the employer makes payments in pursuance of two or more attachment of earnings order relating to the defendant, the sum of sixpence in respect of each such payment.

32.—(1) Any person who—

(*a*) fails to comply with any requirement of this Schedule, or of an order under this Schedule, that is applicable to him ; or

(*b*) in any statement or notice furnished to a court under this Schedule or in compliance with an order made under this Schedule makes a statement that he knows to be false or misleading in a material particular ; or

(*c*) recklessly furnishes such a statement or notice that is false or misleading in a material particular,

shall be guilty of an offence punishable on conviction by a fine not exceeding one hundred pounds.

(2) It shall be a defence if a person charged with an offence arising under subparagraph (1) (*a*) above proves that he took all reasonable steps to comply with the requirement or order.

33. Any person who dismisses an employee, or injures him in his employment, or alters his position to his prejudice, by reason of the circumstance that an attachment of earnings order has been made in relation to the employee or that the person is required to make payments under such an order in relation to the employee shall be guilty of an offence punishable on conviction by a fine not exceeding one hundred pounds.

34. In any proceedings for an offence arising under paragraph 33 above, if all the facts and circumstances constituting the offence, other than the reason for the action of the person charged with having committed the offence, are proved, the burden shall be upon that person to prove that he was not actuated by the reason alleged in the charge.

35. Where a person is convicted of an offence arising under paragraph 33 above, the court by which he is convicted may order that the employee be reimbursed any wages lost by him, and may also direct that the employee be reinstated in his old position or in a similar position.

36. This Schedule shall have effect in relation to a defendant notwithstanding any law that would otherwise prevent the attachment of his earnings or limit the amount capable of being attached.

MADE at Lagos this 17th day of March 1970.

MAJOR-GENERAL Y. GOWON,
Head of the Federal Military Government,
Commander-in-Chief of the Armed Forces,
Federal Republic of Nigeria

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Supplement to Official Gazette Extraordinary No. 15, Vol. 57, 20th March, 1970—Part B

L.N. 26 of 1970

MATRIMONIAL CAUSES DECREE 1970
(1970 No. 18)

Matrimonial Causes Decree 1970 (Appointed Day)]Order 1970

In exercise of the powers conferred on me by section 116 (2) of the Matrimonial Causes Decree 1970, and of all other powers enabling me in that behalf, I hereby make the following Order :—

1. The day appointed for the coming into operation of the Matrimonial Causes Decree 1970 shall be 17th March 1970.

Commencement date of Matrimonial Causes Decree 1970. 1970 No. 18.

2. This Order may be cited as the Matrimonial Causes Decree 1970 (Appointed Day) Order 1970.

Citation.

MADE at Lagos this 17th day of March 1970.

T. O. ELIAS,
Federal Commissioner for Justice

TABLE OF STATUTES.

In the list of Nigerian Enactments, references in the Parentheses to a Chapter number and Year, e.g. Cap.12, 1923 ed., are, except where otherwise indicated, references to the Chapter number in the Revised Edition of the Laws of Nigeria, or the Federation of Nigeria, of such Year.

A. NIGERIAN (PRE-FEDERATION) ENACTMENTS.

B. NIGERIAN POST-FEDERATION ENACTMENTS

Page

Page

C. EASTERN NIGERIA STATES

References in the Parentheses to a Chapter number are, except where otherwise indicated, references to the Chapter number in the 1963 Revised Edition of the Laws of the former Eastern Region of Nigeria.

Page

Page

D. LAGOS STATE

References in the Parentheses to a Chapter number and Year are, except where otherwise stated, references to the Chapter number in the Revised Edition of the Laws of the Federation of Nigeria and Lagos of such Year.

E. NORTHERN NIGERIA STATES

References in the Parentheses to a Cahpter number are, except where otherwise indicated, references to the Chapter number in the 1963 Revised Edition of the Laws of the former Northern Region of Nigeria.

F. WESTERN AND MID-WESTERN STATES

References in the Parentheses to a Chapter number are, except where otherwise indicated, references to the Chapter number in the 1959 Revised Edition of the Laws of the former Western Region of Nigeria.

G. FOREIGN COUNTRIES

Page

TABLE OF CASES

Page

Page

Page

Page

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